No. (1)

Supreme Court, U.S.
FILED

081374 MAY 5 - 2009

OFFICE OF THE CLERK

In The

Supreme Court of the United States

CHRIS ROBINSON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL D. CROSS
Attorney at Law
1020 West Main Street
Post Office Box 99
Monteagle, TN 37356
(931) 924-2060

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether for purposes of satisfying the enhanced penalty provisions of 21 USC 841(b)(1)(A) and (b)(1)(B), factual findings regarding drug quantities must be defendant-specific for reasons of statutory construction, compliance with *Pinkerton vs. United States*, due process, or to avoid unconstitutional vagueness of jury instructions.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 7

THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER DEFENDANT-SPECIFIC DRUG QUANTITY FINDINGS MUST BE MADE FOR PURPOSES OF TRIGGERING THE ENHANCED PENALTY PROVISIONS OF 21 USC SECTIONS 841(b)(1)(A) AND (b)(1)(B) 7

CONCLUSION 16

APPENDIX:

SIXTH CIRCUIT OPINION ..... App. 1

DISTRICT COURT JUDGMENT ..... App. 21

SIXTH CIRCUIT ORDER DENYING REHEARING ..... App. 32

EXCERPTS OF TRIAL PROCEEDINGS 10-2-06 ..... App. 33

TABLE OF CONTENTS – Continued

Page

EXCERPTS OF TRIAL PROCEEDINGS 10-3-06 ..... App. 38

EXCERPTS OF TRIAL PROCEEDINGS 10-3-06 (DISCUSSION REGARDING COMMUNICATION FROM JURY) ..... App. 41

TABLE OF AUTHORITIES

Page

CASES

Apprendi vs. New Jersey, 530 U.S. 466 (2000) 8, 9, 13, 14

Barbour vs. U.S., 543 U.S. 1102 (2005) 12

Edwards vs. U.S., 533 U.S. 511, 118 S. Ct. 1475, 140 L. Ed. 2d 703 (1998) 9, 10, 11

Mack vs. U.S., 543 U.S. 1107 (2005) 12

Pinkerton vs. U.S., 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946) 8, 11, 14, 15, 16

U.S. vs. Alvarez, 755 F.2d 830 (11th Cir. 1985) 15

U.S. vs. Banuelos, 322 F.3d 700 (9th Cir. 2003) 7, 8, 9, 14

U.S. vs. Becerra, 992 F.2d 960 (9th Cir. 1993) 9

U.S. vs. Capps, 93-3718, 93-3719, 93-3720, 93-3721 (6th Cir. March 10, 1995) U.S. App. LEXIS 5195 ..... 14, 16

U.S. vs. Collins, 415 F.3d 304 (4th Cir. 2005) 7, 8, 13, 14

U.S. vs. Darwich, 337 F.3d 645 (6th Cir. 2003) 13

U.S. vs. Derman, 298 F.3d 34 (1st Cir. 2002) 10, 11, 12

U.S. vs. Irvin, 2 F.3d 72 (4th Cir. 1993) 8

U.S. vs. Knight, 342 F.3d 697 (7th Cir. 2003) 12

U.S. vs. Nelson-Rodriguez, 319 F.3d 12 (1st Cir. 2003) 11, 12

U.S. vs. Phillips, 349 F.3d 138 (3rd Cir. 2003) 12

TABLE OF AUTHORITIES – Continued

Page

U.S. vs. Pruitt, 156 F.3d 638 (6th Cir. 1998), *cert. denied* January 11, 1999 ..... 15, 16

U.S. vs. Robinson, 547 F.3d 632 (6th Cir. 2008) 1, 2, 4, 5, 6, 7, 8, 9, 10, 13, 14, 15, 16

U.S. vs. Stiger, 413 F.3d 1185 (10th Cir. 2005) 12

U.S. vs. Turner, 319 F.3d 716 (5th Cir. 2003) 12

STATUTES

18 USC Section 2 13

21 USC Section 841 ..... 7, 10, 13, 14, 15, 16

21 USC Section 843 4

21 USC Section 846 ..... 4, 6, 8, 9

28 USC Section 1254(1) 1

U.S. SENTENCING GUIDELINES

USSG Section 1B1.3 ..... 10, 12

USSG Section 5G1.1 10

U.S. CONSTITUTION PROVISIONS

U.S. Constitution Amendment 5 ..... 2, 12

U.S. Constitution Amendment 6 13

OPINION BELOW

The Sixth Circuit Court of Appeals issued its substantive opinion in this case November 4, 2008. That opinion is now reported as *U.S. vs. Robinson*, 547 F.3d 632 (6th Cir. 2008). This opinion is attached as Appendix pages 1-20. The Sixth Circuit case number was 07-5474, and the unofficial citation is 208 Fed. App. 0418P.

The Petitioner subsequently filed a petition for rehearing en banc in the Sixth Circuit. Rehearing was denied by Order filed February 5, 2009, a copy of which is set out in the Appendix at page 32.

The District Court did not publish an opinion; its judgment is set out in Appendix pages 21-31. Its case number was 4:06-cr-04. A pre-trial evidentiary ruling of the district court, not relevant to this petition, is available at 2006 U.S. Dist. LEXIS 71496.

JURISDICTION

The Sixth Circuit filed its substantive opinion November 24, 2008 and entered an Order denying Petitioner's petition for rehearing on February 5, 2009. This Court has jurisdiction under 28 USC Section 1254(1) to review this Circuit Court's decision on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 USC SECTION 841

(a) UNLAWFUL ACTS

Except as authorized by the subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

. . . .

(b) Except as otherwise provided in section 859, 860, 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

. . . .

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

. . . .

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

. . . .

such person shall be sentenced to a term of imprisonment which may be not less than 10 years or more than life . . . If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence.

. . . .

(C) In the case of controlled substance in Schedule I or II . . . If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be

sentenced to a term of imprisonment for not more than 30 years. . . .

21 USC SECTION 846

ATTEMPT AND CONSPIRACY

Any person who attempts or conspires to commit any offense defined in this sub-chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the Court of first instance, the United States District Court for the Eastern District of Tennessee, is the federal indictment alleging that the Defendant had violated federal criminal statutes, 21 USC Sections 841(a)(1) and (b)(1)(A) and (B); and 21 USC Section 843(b). The asserted violation of 21 USC Section 841(b)(1)(B), concerning the distribution of marijuana, was abandoned by the government at trial, so there is no corresponding conviction and is therefore not at issue on appeal. Likewise, the alleged violations of 21 USC Section 843(b), though resulting in convictions, are not at issue on appeal. What is at issue is the 841(a) and (b)(1)(A) conviction involving cocaine and resulting in a life sentence (App. 23).

The superceding indictment in this cause charged Petitioner with being a member of a drug conspiracy which existed from on or about December, 2003 until on or about March of 2006. Mr. Robinson was charged along with 18 codefendants, all of whom were charged in Count 1, the conspiracy count; some of whom (but not Robinson) were charged with substantive – i.e. not conspiracy – counts of 21 USC 841(a); most or all, including Robinson, were charged with violations of 21 USC 843(b), use of a communication facility to facilitate a drug felony, a crime carrying by statute a maximum of four years of imprisonment.

The investigation which ultimately caught Mr. Robinson began with a wiretap of the telephone of Juan Valentin. This wiretap was monitored for 88 days. The total quantity of cocaine discernable from wiretap conversations between Valentin and Robinson was 38 and one-half ounces, slightly over one kilogram.

Law enforcement authorities testified at trial that, on two occasions, one of which was Valentin's arrest, he (Valentin) was known to have had quantities of three and five kilograms, of cocaine respectively, in his possession (App. 34-37). There was no evidence that Robinson was involved with either of these amounts or even knew about them.

In closing argument, AUSA Piper argued that the requisite five kilogram quantity for establishing a violation of 21 USC 841(b)(1)(A), which, in Robinson's case, would result in a life sentence owing to two

prior drug felony convictions, could be established by taking the Defendant's supposed per-week purchases from Valentin as discernable from the wiretap and multiplying that figure by the number of weeks the conspiracy existed, a process which would result in eight or nine kilograms (App. 39).

The jury charge instructed the jurors that the determination of whether the Petitioner was guilty as charged of 21 USC 846 and 841(a) and (b)(1)(A) was a two-step process, the second step requiring the jury simply to determine whether the offense "involved" the required five-kilogram amount (App. 40).

The jury was apparently unimpressed with the method Mr. Piper had suggested in his closing argument for arriving at the five-kilogram quantity threshold and, during deliberations, submitted a question to the Court, asking whether they could resort to quantities of which Petitioner was unaware handled by co-conspirators (App. 42, 45). What the jury had in mind as candidates for constituting the five-kilogram quantity is virtually guaranteed to have been either or both of the previously-referenced three and five kilogram quantities known by law enforcement to have been in Valentin's possession, since the proof suggested little if anything else.

Over the Petitioner's counsel's insistence that the response required the jury to find the Defendant to have knowledge of the transactions not involving him personally (App. 43-44), the District Court reiterated to the jury merely that the required five kilograms

must have been "involved in the conspiracy" (App. 45).

Chris Robinson was not the target, or at least not the "big target" of the investigation. The government never contended that Robinson operated at the same level in the drug business as Valentin, who dealt in large volumes of cocaine.

Petitioner was sentenced to life imprisonment (App. 23).

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER DEFENDANT-SPECIFIC DRUG QUANTITY FINDINGS MUST BE MADE FOR PURPOSES OF TRIGGERING THE ENHANCED PENALTY PROVISIONS OF 21 USC SECTIONS 841(b)(1)(A) AND (b)(1)(B).

In the opinion appealed from, 547 F.3d 632 at 639-640 (2008) (App. 11-12), the Court acknowledged the circuit split on the question of whether the drug-quantity finding must be defendant-specific or conspiracy-wide, citing *U.S. vs. Collins*, 415 F.3d 304, 313-314 (4th Cir. 2005) and *U.S. vs. Banuelos*, 322 F.3d 700, 704-705 (9th Cir. 2003) as standing in opposition to the position taken by the Sixth Circuit in this case.

The Fourth Circuit in *Collins* succinctly framed the question: "Should an individual defendant, found guilty of conspiracy to violate Section 841(a) be sentenced under Section 841(b) by considering the amount of narcotics distributed by the *entire conspiracy*? Or should that defendant's sentence be more individualized, subjecting him to punishment only for distribution of the amount of narcotics *attributable to him*?", *Collins* at 312 (emphasis in original). That court noted that its prior decision in the case of *U.S. vs. Irvin*, 2 F.3d 72 (4th Cir. 1993) had required such findings to be defendant-specific; *Collins* effectively extended *Irvin* in the light of *Apprendi vs. New Jersey*, 530 U.S. 466 (2000). "*Apprendi* and *Promise* altered *Irvin's* holding by effectively replacing the words 'a district court' with 'the jury' and requiring proof beyond a reasonable doubt. Although *Apprendi* modified *Irvin* in this matter, *Irvin's* holding that *Pinkerton*[1] principles should be used to determine, for sentencing purposes, the amount of narcotics attributable to any one individual in a conspiracy, remains good law[.]" *Collins* at 314.

In *Banuelos*, the Ninth Circuit, in a 21 USC 846/841(a)(1) prosecution, noted that it was accepted in that circuit that a statutory mandatory minimum

---

[1] The reference is to the case of *Pinkerton vs. U.S.*, 328 U.S. 640 at 647-48 (1946), which holds that a member of a conspiracy may be held criminally liable for the reasonably foreseeable crimes committed by other members of the conspiracy during the course and in furtherance of the conspiracy. (Footnote added.)

sentence could not be imposed without a finding that "a particular defendant had some connection with the larger amount on which the sentence is based or that he could reasonably foresee that such an amount would be involved in the transactions of which he was guilty", *Banuelos* at 704, quoting *U.S. vs. Becerra*, 992 F.2d 960, 966-67 & n. 2 (9th Cir. 1993). The *Banuelos* court restated the standard: "[T]he district court was required to find not only that the conspiracy distributed a particular type and quantity of drugs, but also that the type and quantity were either within the scope of Banuelos' agreement with his coconspirators or that the type and quantity were reasonably foreseeable to Banuelos", *Banuelos* at 704.

So far as the undersigned has been able to determine, the closest this Court has come to addressing this issue is the case of *Edwards vs. United States*, 533 U.S. 511, 118 S. Ct. 1475, 140 L. Ed. 2d 703 (1998). In that pre-*Apprendi* case, the defendant had been charged under 21 USC Sections 841 and 846 with conspiracy to distribute both cocaine and cocaine base. The jury verdict was silent as to which substance Edwards was guilty of having conspired to distribute. The Court noted that the guidelines required the judge to make this determination. "Virtually conceding this Guidelines-related point, petitioners argue that the drug statutes, as well as the Constitution, required the judge to assume that *the jury* convicted them of a conspiracy involving *only* cocaine. Petitioners misapprehend the significance of this contention, however, for even if they are correct, it would

make no difference to their case", *Edwards* at 514, 1477 (emphasis in original).

The reasoning was that the sentencing guidelines instruct the judge to base a drug-conspiracy offender sentence on relevant conduct (USSG Section 1B1.3), which would include, in that case, both the (powder) cocaine and the much-more-harshly punished cocaine base.

Of particular significance to the present case, however, is the following: "Of course, petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy", *Edwards* at 515. When quantity is substituted for type as the triggering criterion for enhancement under 841(b)(1), the facts of *Robinson* fit this scenario perfectly: The maximum sentence permissible under 841(b)(1)(C) of 30 years, applicable where the cocaine amount is unspecified, is lower than the minimum sentence (of life, for Robinson) under 841(b)(1)(A). " . . . [A] maximum sentence set by statute trumps a higher sentence set forth in the Guidelines. USSG Section 5G1.1", *Edwards* at 515.

The Sixth Circuit in its opinion in this case relies substantially on the First Circuit case of *U.S. vs. Derman*, 298 F.3d 34 (1st Cir. 2002). The First Circuit, basing its decision to some extent on *Edwards*, held that

> . . . the jury should determine the existence *vel non* of the conspiracy as well as any facts about the conspiracy that will increase the possible penalty for the crime of conviction beyond the default statutory maximum; and the judge should determine, at sentencing, the particulars regarding the involvement of each participant in the conspiracy. *Edwards*, 523 U.S. at 514, 118 S. Ct. 1475. This means that once the jury has determined that the conspiracy involved a type and quantity of drugs sufficient to justify a sentence above the default statutory maximum and has found a particular defendant guilty of participation in the conspiracy, the judge may lawfully determine the drug quantity attributable to that defendant, and sentence him accordingly (so long as the sentence falls within the statutory maximum made available by the jury's conspiracy-wide drug quantity determination).

In the subsequent case of *U.S. vs. Nelson-Rodriguez*, 319 F.3d 12 (1st Cir. 2003), that court, noting that "*Derman* itself involved a relatively simple conspiracy" (*Nelson-Rodriguez* at 46) retreated from *Derman*: "That simple approach may break down for more complex conspiracies involving multiple transactions of different amounts of drugs imported at different times, with a shifting cast of actors . . . There may be one conspiracy; there may be multiple conspiracies. Or a defendant may raise *Pinkerton* issues . . . Some of these problems might be solved by more specificity in indictments, by tailored instructions,

and by special verdicts[.]" *Nelson-Rodriguez* at 46-47. " . . . [W]e recognize that [*Derman*] is not necessarily the last word on the subject." *Id.* at 46.

The *Robinson* opinion cites the cases of *United States vs. Phillips*, 349 F.3d 138, 142-43 (3rd Cir. 2003), *vacated and remanded on other grounds sub nom. Barbour vs. United States*, 543 U.S. 1102 (2005), *United States vs. Turner*, 319 F.3d 716, 722-23 (5th Cir. 2003), *United States vs. Knight*, 342 F.3d 697, 710 (7th Cir. 2003), *United States vs. Stiger*, 413 F.3d 1185, 1192-93 (10th Cir. 2005), *vacated and remanded on other grounds sub nom. Mack vs. United States*, 543 U.S. 1107 (2005) as being in accord on this issue with *Derman*.

In the more typical *Derman* scenario, the finding by the jury of a conspiracy-wide drug amount results in an elevated statutory maximum, with some semblance of fairness presumably supplied by the discretion of the judge to sentence below that statutory maximum based on the culpability of a particular defendant. With regard to Robinson, however, this safeguard does not exist, since the conspiracy-wide quantity mandated a life sentence as a *minimum* punishment. This absence of safeguards violates fundamental fairness and due process under the Fifth Amendment to the U.S. Constitution.

Even the U.S. Sentencing Guidelines (1B1.3(a)(1)(B)) impose a foreseeability limitation on relevant conduct: " . . . [A]ll reasonably foreseeable acts and omissions of others in furtherance of the jointly

undertaking criminal activity". Similarly, aiding and abetting requires that a defendant aid, abet, counsel, command, induce, or procure the commission of the crime, or willfully cause a criminal act, to be punishable as a principal; 18 USC Section 2.

The question of whether a defendant has a right under the Sixth Amendment, U.S. Constitution, to have a jury make the defendant-specific quantity determination was pretermitted in *Robinson*, which held that the determination did not have to be made at all. To the undersigned's knowledge, no Circuit which has held that defendant-specific findings are required has held or suggested that *Apprendi* would permit this determination to be made by a judge. This result would seem to be compelled; each of the subsections of 21 USC Section 841(b) constitutes a separate offense with separate elements which all must be proved beyond a reasonable doubt when a defendant guilty of a conspiracy is sentenced in excess of the default statutory maximum (set out in 841(b)(1)(D) in the case of marijuana), *U.S. vs. Darwich*, 337 F.3d 645, 655 (6th Cir. 2003). The remedy upon a failure would seem to be a resentencing under the default subsection of 841(b) applicable to an unspecified drug amount, 841(b)(1)(C) in the case of cocaine. Notwithstanding, the Fourth Circuit in the previously-cited case of *U.S. vs. Collins*, gave the government the choice between re-sentencing the defendant under the Section 841 default provision applicable to an unspecified amount of cocaine or a

reversal of the conspiracy conviction with the opportunity to retry the charge (*Collins* at 315).

In the previously-cited case of *U.S. vs. Banuelos*, 322 F.3d 700 (9th Cir. 2003), the issue was whether the district court, in sentencing for a conviction entered pursuant to a guilty plea, erred in applying a clear-and-convincing standard to the reasonably foreseeable/within scope of agreement requirement. The Ninth Circuit held this to be error noting also that *Apprendi* was violated as well, *Id.* pp. 704-706 and n. 3. The error was not harmless since the improperly-made quantity determination resulted in a doubling of the defendant's sentence over the otherwise-applicable statutory maximum sentence of five years, *Id.* p. 706. The remedy was resentencing pursuant to the proper standard, *Id.*

The case of *Pinkerton vs. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946) stands as authority for the proposition that one conspirator may be criminally responsible for the substantive offenses committed by another conspirator, if those offenses were done in furtherance of the conspiracy and were reasonably foreseeable to the defendant, *Pinkerton* at 647-48, 1184. Although the Court in *Collins* stated (*Collins* at 313) that the quantity determinations for purposes of satisfying the elevated subsections of 841(b) did not technically fit the facts of *Pinkerton*, still, the *Collins* holding was that "*Pinkerton* principles" should be used, *Collins* at 314. At least one pre-*Apprendi* and pre-*Robinson* Sixth Circuit case, *U.S. vs. Capps*, 93-3718, 93-3719,

93,3720, 93-3721 (6th Cir. March 10, 1995) U.S. App. LEXIS 5195 at *20-*21 referred to the lack of a standard for testing whether a drug amount should or should not be attributed to a defendant as a "vacuum", and in the light of this vacuum, directed the District Court to apply those set out in USSG Section 1B1.3. In the case of jointly undertaken criminal activity, whether or not charged as conspiracy, a defendant is responsible for "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity", a standard which is substantially similar to that offered by *Pinkerton*.

Pinkerton has been held to be constitutionally mandated, *U.S. vs. Alvarez*, 755 F.2d 830 (11th Cir. 1985), suggesting also that *Pinkerton* might, in certain cases, be insufficient to protect due process concerns.

The matter of attribution of drug amounts to a conspirator is not addressed by 21 USC Section 841 or Section 846, the two statutes which, in tandem, have resulted in a life sentence for Petitioner. Neither one nor the two together addresses the question of whether drug-quantity findings must be defendant-specific.

The Sixth Circuit's ruling in *Robinson* violated the spirit if not the letter of its prior holding in *U.S. vs. Pruitt*, 156 F.3d 638 (6th Cir. 1998), *cert. denied* January 11, 1999. In *Pruitt*, that court effectively imposed the *Pinkerton* limitation which was said to " . . . provide[s] adequate protection against the possibility that a less culpable, 'small-time' seller of drugs

will be caught up in the sweep of Section 841(b) due to the acts of co-conspirators", *Pruitt* at 645. Characterizing this language in *Pruitt* as dicta (*Robinson* at 638, App. 9), the Sixth Circuit in *Robinson* eliminated the *Pinkerton* limitation and upheld Petitioner's life sentence.

Robinson cleanly frames the conspiracy-wide/defendant-specific drug-quantity-attribution question. The jury focused in on it, and it was apparently critical to their determination that the 5-kilogram threshold had been met. This uncertainty has existed at least since the previously cited *Capps* decision of 1995. The stakes for Mr. Robinson, a relatively young man, and doubtless for many others, are high.

CONCLUSION

The Court should grant the writ of certiorari and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

PAUL D. CROSS
CLEMENTS AND CROSS
Attorney for Petitioner
Post Office Box 99
Monteagle, TN 37356
(931) 924-2060

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 08a0418p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* CHRIS ROBINSON, *Defendant-Appellant.*	No. 07-5474

Appeal from the United States District Court
for the Eastern District of Tennessee at Winchester.
No. 06-00004 – Curtis L. Collier, Chief District Judge.

Argued: September 17, 2008

Decided and Filed: November 24, 2008

Before: GUY, BATCHELDER, and
McKEAGUE, Circuit Judges.

COUNSEL

ARGUED: Paul D. Cross, CLEMENTS & CROSS, Monteagle, Tennessee, for Appellant. Perry H. Piper, ASSISTANT UNITED STATES ATTORNEY, Chattanooga, Tennessee, for Appellee. **ON BRIEF:** Paul D. Cross, CLEMENTS & CROSS, Monteagle, Tennessee, for Appellant. Perry H. Piper, ASSISTANT UNITED

STATES ATTORNEY, Chattanooga, Tennessee, for Appellee.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Defendant-Appellant Chris Robinson appeals his conviction and sentence for conspiracy to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(b)(1)(A) and 846. Robinson argues that: (1) the district court erroneously instructed the jury to determine the quantity of cocaine "involved in the conspiracy" instead of the quantity individually attributable to him; (2) the district court failed to charge a violation of 21 U.S.C. § 841(b)(1)(C) as a lesser-included offense; (3) the evidence was insufficient to prove his participation in a conspiracy; and (4) there was a prejudicial variance between the indictment and the proof at trial. Finding no merit in any of these contentions, we AFFIRM.

I. BACKGROUND

A grand jury indicted Robinson for his role in a conspiracy to distribute five or more kilograms of cocaine in the Eastern District of Tennessee from December 2003 through March 2006. At trial, the primary evidence against Robinson consisted of alleged co-conspirator Juan Valentin's testimony and a series of recorded telephone conversations between

Valentin and Robinson that DEA officers intercepted from Valentin's cell phone over a period of 88 days, beginning on May 5, 2005.

Valentin testified that beginning in December 2003, he developed "a business relationship" with Robinson in which the two of them worked together to sell cocaine. According to Valentin, he sold cocaine to Robinson "once or twice a week" in various quantities, sometimes on credit. The quantity he most frequently sold to Robinson was four-and-a-half ounces, which Valentin described as a "regular," and the largest single quantity exchanged between them was half a kilogram. Besides purchasing and distributing cocaine, Robinson helped the conspiracy in other ways, Valentin explained. Robinson introduced Valentin to Troy Allison, who became one of Valentin's "good customer[s]" of cocaine.[1] Valentin testified that Robinson once accompanied him to Memphis, Tennessee, to pick up "a couple kilos" of cocaine.

Most of the recorded telephone conversations consist of Robinson's ordering various quantities of cocaine.[2] But the calls reveal other aspects of

---

[1] Troy Allison testified that Robinson had introduced him to Valentin. Allison purchased "a quarter kilo" of cocaine from Valentin upon meeting him and continued to buy from him after that. Allison "ultimately buil[t] up to" buying one kilogram of cocaine at a time from Valentin, with his largest single purchase being two kilograms.

[2] In the 14 conversations played for the jury, Valentin and Robinson discuss a minimum total of 38-and-a-half ounces of cocaine.

Robinson's involvement with the business: Robinson twice warns Valentin about police investigation into Valentin's activities; Valentin several times asks Robinson to help collect money from individuals whom Valentin had given cocaine on credit; and Valentin on one occasion discusses with Robinson how to retrieve a safe full of cash from a car impounded by the police.

After the presentation of all evidence, the district court charged the jury, in part:

> If you determine defendant is guilty of the offense charged in Count 1, you must then determine whether that offense involved the particular quantity of drugs charged in the indictment. In Count 1 defendant is charged with conspiring to distribute 5 kilograms or more of a mixture and substance containing a detectable amount of cocaine hydrochloride. On the verdict form I have asked you to answer some questions about the amount of the mixture and substance containing a detectable amount of cocaine hydrochloride in this offense. In determining the amount of controlled substance involved in each of these crimes, you should consider all of my previous instructions regarding the consideration of evidence. You should only answer yes to one of these questions on the verdict form if you determine, first, that defendant is guilty beyond a reasonable doubt of the particular offense charged in the indictment, and, second, that the government has proven

> beyond a reasonable doubt that the offense involved the specified quantity of a mixture and substance containing a detectable amount of cocaine hydrochloride listed in the question.

Question 1(A) of the verdict form directed the jury to complete the following sentence: "We, the jury, unanimously find that the defendant, ___ (IS NOT/IS) guilty of the offense charged in Count 1 of the Indictment." If the jury answered "IS guilty" to Question 1(A), they were directed to answer "Yes" or "No" to Question 1(B): "Do you, the jury, unanimously find the Government has proved beyond a reasonable doubt that the offense charged in Count 1 of the Indictment involved five kilograms or more of a mixture or substance containing cocaine hydrochloride?" If the jury answered "No" to Question 1(B), they were asked to answer Question 1(C): whether the jury found the quantity of cocaine to be at least 500 grams.

During their deliberations, the jury sent a question to the court inquiring "whether Mr. Robinson must have knowledge of the selling of 5 kilograms of cocaine hydrochloride or if he has to have direct involvement with selling 5 kilograms of cocaine hydrochloride." Robinson's counsel argued "that knowledge is required" and "that the answer should be yes." The district court, however, responded:

> With respect to the conspiracy, the instructions indicate that the government must prove that two or more persons conspired or

> agreed to commit the crime of distributing cocaine hydrochloride, the defendant knowingly joined the conspiracy, and the defendant voluntarily and intentionally participated in the conspiracy. Again, the essence of the conspiracy is the agreement, not the accomplishment of the act.
>
> Concerning the drug quantities, you are merely to determine what quantity was involved in the conspiracy the defendant participated in, in the event you find he participated in a conspiracy.

The jury returned a verdict of guilty and found that the quantity of cocaine involved in the conspiracy was five kilograms or more. The district court imposed a sentence of life imprisonment, and Robinson timely appealed his conviction to this Court.

II. ANALYSIS

A. Drug Quantity Instruction

"This court reviews a district court's 'actions in responding to questions from the jury' for abuse of discretion." *United States v. Davis,* 490 F.3d 541, 548 (6th Cir. 2007) (quoting *United States v. August,* 984 F.2d 705, 712 (6th Cir. 1992)). "This circuit has set a high standard for reversal of a conviction on the grounds of improper instructions." *United States v. Khalil,* 279 F.3d 358, 367 (6th Cir. 2002) (quoting *United States v. Sheffey,* 57 F.3d 1419, 1429 (6th Cir. 1995)). "A reviewing court may reverse a judgment only if the instructions, viewed as a whole, were

confusing, misleading and prejudicial." *Id.* (quoting *United States v. Clark*, 988 F.2d 1459, 1468 (6th Cir. 1993)).

In its initial instructions, and again in response to the jury's question, the district court directed the jury to determine the quantity of cocaine "involved in the conspiracy." These instructions tracked the language of 21 U.S.C. § 841(b)(1)(A), which provides:

> *In the case of a violation of* [21 U.S.C. § 841(a)] *involving* . . . 5 kilograms or more of a mixture or substance containing a detectable amount of . . . cocaine . . . such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . If any person commits a violation of this subparagraph . . . after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release.

(Emphasis added).[3] 21 U.S.C. § 841(a)(1) makes it "unlawful for any person knowingly or intentionally – to . . . distribute . . . a controlled substance." 21 U.S.C. § 846 in turn provides: "Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy." The district

---

[3] Robinson has two prior convictions for felony drug offenses.

court thus instructed the jury that the relevant quantity determination is of the quantity involved in the violation of 21 U.S.C. § 841(a) – in this case, a conspiracy to distribute cocaine. The jury's finding that the quantity equaled or exceeded the threshold amount of five kilograms triggered a mandatory life sentence for Robinson.

Citing our decision in *United States v. Pruitt,* 156 F.3d 638 (6th Cir. 1998), Robinson argues that a drug conspirator is culpable only for quantities personally attributable to him. The issue in *Pruitt,* however, was "whether a conspiracy involving multiple overt acts is nonetheless 'a violation' of [21 U.S.C.] § 841(a)" such that the drug quantities from those multiple acts can be aggregated for sentencing under 21 U.S.C. § 841(b)(1)(A). *Id.* at 644. This Court answered the question in the affirmative, noting that "a conspiracy is a single, unified offense" and that "the traditional rule . . . treats a conspiracy as a whole." *Id.* We thus interpreted 21 U.S.C. § 841(b)(1)(A) to focus on the threshold quantity involved in the entire conspiracy.

Robinson nonetheless contends that other language from that opinion supports his position. He points, for example, to our observation in *Pruitt* that "[w]hile a person who participates in a drug conspiracy does not necessarily agree to a specific amount in advance, no defendant may be held responsible for acts beyond the scope of his or her participation in the conspiracy." *Id.* at 644-45 (citing *United States v. Myers,* 102 F.3d 227, 237 (6th Cir. 1996) (citing in turn *Pinkerton v. United States,* 328 U.S. 640, 646-47

(1946))). "[T]his rule," we explained, "provides adequate protection against the possibility that a less culpable, 'small-time' seller of drugs will be caught up in the sweep of § 841(b) due to the acts of coconspirators." *Id.* at 645. We also observed that "the district court included only amounts for which [the appellant] was directly responsible, rather than imputing to him the acts of other defendants, despite conviction on the conspiracy count." *Id.*

These statements do not help Robinson as much as he would like. Again, the issue in *Pruitt* was whether a conspiracy comprising multiple transactions was a single violation of 21 U.S.C. § 841(a). The issue was not whether the appellant was culpable for acts of his co-conspirators, and any pronouncements on that topic are dicta. Moreover, that portion of *Pruitt* turned on an analysis of *Pinkerton*. Although our *Pinkerton* analysis was correct, it is inapplicable here. *See United States v. Collins,* 415 F.3d 304, 313 (4th Cir. 2005) ("The principles outlined in *Pinkerton* . . . have no applicability to a conviction under § 846. *Pinkerton* principles are relevant when a conspirator is charged with a substantive offense arising from the actions of a co-conspirator, not when a conspirator is charged with conspiracy."). It is true that a conspirator is liable for the substantive offenses of his co-conspirators only if those offenses are, among other things, reasonably foreseeable to him. *Pinkerton,* 328 U.S. at 647-48. But this principle is distinct from the equally established rule that conspiracy is an inchoate offense that needs no substantive offense for

its completion. *Iannelli v. United States,* 420 U.S. 770, 777-78 (1975). The district court here was correct to remind the jury that "the essence of the conspiracy is the agreement, not the accomplishment of the act." *See United States v. Spearman,* 186 F.3d 743, 746 (6th Cir. 1999) ("An overt act need not be proven in a § 846 conspiracy.") (quoting *United States v. Bourjaily,* 781 F.2d 539, 544 (6th Cir. 1986)).

Our holding in *Pruitt* affirms this understanding of drug conspiracies. We distinguished culpability for the conspiracy itself from culpability for the substantive offenses of co-conspirators. Although a "small-time" drug seller may not be responsible for all the transactions or actions of his associates, he is responsible for the conspiracy in which he participated. While we observed that the district court included only amounts for which it found the appellant directly responsible, we noted this fact only inasmuch as it demonstrated that he was not improperly held culpable for the substantive offenses of his co-defendants. *Pruitt,* 156 F.3d at 645. And we recognized that 21 U.S.C. § 841(b)(1)(A) prescribes mandatory sentences for "a violation" – including a conspiracy – "involving" certain threshold amounts of drugs. *Id.* Accordingly, the quantity instructions here did not improperly lead the jury to convict Robinson for the substantive acts of his co-conspirators.

Similarly unavailing is Robinson's suggestion that the quantity instructions violated the rule articulated by the Supreme Court in *Apprendi v. New Jersey,* 530 U.S. 466 (2000). Under *Apprendi,* "[o]ther

than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. Here, the "fact" that increases the default penalty for a conspiracy to distribute drugs is the quantity of drugs involved in the conspiracy.

The First Circuit has noted that *Apprendi* did not overrule the Supreme Court's earlier decision that

> as long as (1) the jury finds beyond a reasonable doubt that a defendant participated in a conspiracy, and (2) the Court sentences him within the statutory maximum *applicable to that conspiracy,* the court may "determine both the amount and the kind of 'controlled substances' for which [the] defendant should be held accountable – and then . . . impose a sentence that varies depending upon amount and kind."

Derman v. United States, 298 F.3d 34, 42 (1st Cir. 2002) (quoting *Edwards v. United States,* 523 U.S. 511, 513-14 (1998)) (emphasis in original). The jury need only determine that the defendant participated in a conspiracy involving "a type and quantity of drugs sufficient to justify a sentence above the default statutory maximum." *Id.* at 43. Most other circuits have agreed that *Apprendi* is satisfied where the jury finds, beyond a reasonable doubt, the quantity of drugs involved in the conspiracy as a whole

under 21 U.S.C. § 841(b)(1)(A).[4] *See United States v. Phillips,* 349 F.3d 138, 142-43 (3rd Cir. 2003), *vacated and remanded on other grounds sub nom. Barbour v. United States,* 543 U.S. 1102 (2005), *United States v. Turner,* 319 F.3d 716, 722-23 (5th Cir. 2003), *United States v. Knight,* 342 F.3d 697, 710 (7th Cir. 2003), *United States v. Stiger,* 413 F.3d 1185, 1192-93 (10th Cir. 2005), *vacated and remanded on other grounds sub nom. Mack v. United States,* 543 U.S. 1107 (2005); *but see United States v. Collins,* 415 F.3d 304, 313-14 (4th Cir. 2005) and *United States v. Banuelos,* 322 F.3d 700, 704-05 (9th Cir. 2003).

Here, the district court had no occasion to determine the amount or kind of drugs for which Robinson was personally responsible because there was no range within which the court had discretion to choose a sentence; the quantity of cocaine involved in the conspiracy and Robinson's prior felony drug convictions triggered a mandatory life sentence. Therefore, because the jury found beyond a reasonable doubt that Robinson had participated in a conspiracy that involved five or more kilograms of cocaine, there can be no *Apprendi* error. *See Derman,* 298 F.3d at 42-43.

Viewed under the abuse-of-discretion standard, the district court's response to the jury's question was

---

[4] We have previously adopted this view in unpublished opinions. *See United States v. Alaniz,* 75 F. App'x 344, 351-52 (6th Cir. 2003); *United States v. Grooms,* 194 F. App'x 355, 362 (6th Cir. 2006).

not "confusing, misleading and prejudicial." *Khalil,* 279 F.3d at 367. Given that the court's instruction was faithful to the language of 21 U.S.C. § 841(b)(1)(A), Robinson's argument that a different answer was required does not overcome our "high standard for reversal of a conviction on the grounds of improper instructions." *Id.*

B. Lesser-Included-Offense Instruction

Robinson argues that the district court should have charged a violation of 21 U.S.C. § 841(b)(1)(C) (distribution of cocaine with no finding of a threshold quantity) as a lesser-included offense. By failing to do so, Robinson insists, the court deprived the jury of a "third option" and presented them with an "all-or-nothing choice."

Robinson concedes that he did not request such a charge and that review on this issue is for plain error. *See United States v. Jones,* 403 F.3d 817, 821 (6th Cir. 2005) ("[W]here a 'defendant neither requested nor submitted a lesser-included-offense instruction, and did not object to the instructions given by the trial judge, the jury instructions are reviewable only for plain error.'") (quoting *United States v. Donathan,* 65 F.3d 537, 540 (6th Cir. 1995)). "Under the plain error standard, we may reverse if (1) there was error that (2) was plain, (3) affected a substantial right, and (4) 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Martin,* 520 F.3d 656, 658 (6th Cir. 2008) (quoting

United States v. Oliver, 397 F.3d 369, 378 (6th Cir. 2005) (citing *United States v. Olano,* 507 U.S. 725, 732 (1993))).

> A criminal defendant is entitled to an instruction on a lesser-included-offense if: (1) a proper request is made; (2) the elements of the lesser offense are identical to part of the elements of the greater offense; (3) the evidence would support a conviction on the lesser offense; and (4) the proof on the element or elements differentiating the two crimes is sufficiently disputed so that a jury could consistently acquit on the greater offense and convict on the lesser.

United States v. Colon, 268 F.3d 367, 373 (6th Cir. 2001) (quoting *United States v. Monger,* 185 F.3d 574, 576 (6th Cir. 1999)).

Because Robinson never requested a lesser-included-offense instruction, he did not satisfy the first prong of *Colon* and cannot prove any error, much less plain error. Moreover, Robinson's rights were not prejudiced; the verdict form required the jury to determine beyond a reasonable doubt whether the threshold amounts of five kilograms or 500 grams were involved in the conspiracy. An answer of "No" to both of the quantity interrogatories necessarily would have meant that the jury did not find either of the threshold amounts. The verdict form thus provided a "third option" by allowing the jury to convict Robinson of a conspiracy that did not involve any particular quantity of cocaine.

C. Sufficiency of the Evidence

Robinson argues that the evidence was insufficient to prove the existence of a conspiracy.[5] "In determining the sufficiency of the evidence to support a guilty verdict 'the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Martin,* 520 F.3d at 660 (quoting *United States v. Pearce,* 912 F.2d 159, 161 (6th Cir. 1990) (quoting in turn *Jackson v. Virginia,* 443 U.S. 307, 319 (1979))).

To establish a violation of 21 U.S.C. § 846, "the government must prove, beyond a reasonable doubt, '(1) an agreement to violate drug laws, (2) knowledge and intent to join the conspiracy, and (3) participation in the conspiracy.'" *United States v. Caver,* 470 F.3d 220, 232 (6th Cir. 2006) (quoting *United States v. Gibbs,* 182 F.3d 408, 420 (6th Cir. 1999)). Drug conspiracies "often assume[ ] a vertical pattern of distribution, where each successive distributor sells a lower volume to any particular customer. . . . [A]n agreement to supply drugs to a given area can be inferred from the interdependence of the enterprise." *Id.* at 233. "In a drug distribution 'chain' conspiracy, it is enough to show that each member of the conspiracy realized that he was participating in a joint venture,

---

[5] Robinson does not challenge the sufficiency of the evidence regarding the threshold quantity of cocaine.

even if he did not know the identities of every other member, or was not involved in all the activities in furtherance of the conspiracy." *United States v. Martinez,* 430 F.3d 317, 332-33 (6th Cir. 2005). "'[E]vidence of repeat purchases provides evidence of more than a mere buyer-seller relationship,' and the quantity of drugs may also support an inference of conspiracy." *Id.* at 333 (quoting *United States v. Brown,* 332 F.3d 363, 373 (6th Cir. 2003)). Also, the "trust involved" in delivering drug quantities on credit "suggests more than a buyer-seller relationship." *United States v. Nesbitt,* 90 F.3d 164, 167 (6th Cir. 1996).

The evidence was sufficient to show that Robinson conspired with Juan Valentin and others to distribute cocaine. Valentin testified that he and Robinson shared a "business relationship" and that they worked together to sell cocaine. Robinson purchased drugs from Valentin once or twice a week, sometimes on credit, over a period of several years. On at least one occasion, Robinson accompanied Valentin to a source city to pick up "a couple kilos" of cocaine. Robinson helped collect money other buyers owed Valentin. He warned Valentin about police activity. He conferred with Valentin about how to recover drug proceeds from an impounded car. Robinson introduced Troy Allison to Valentin, and Allison became one of Valentin's "good customer[s]." From this evidence a rational trier of fact could find that there was an agreement to violate drug laws, that Robinson knowingly and intentionally joined the

conspiracy, and that Robinson participated in the conspiracy.

D. Variance

Robinson argues that there was a prejudicial variance between the indictment and the proof at trial because the indictment alleged one large conspiracy while the evidence demonstrated several smaller conspiracies. "The court of appeals reviews the question of whether a variance has occurred *de novo*."[6] *Caver*, 470 F.3d at 235. "Within the context of a conspiracy, a variance constitutes reversible error only if a defendant demonstrates that he was prejudiced by the variance and that the 'indictment alleg[d] one conspiracy, but the evidence can reasonably be construed *only* as supporting a finding of multiple conspiracies.'" *Id.* at 235-36 (quoting *United States v. Warner*, 690 F.2d 545, 548 (6th Cir. 1982)) (emphasis in original). "In making this determination, the evidence must be viewed in the light most favorable to the government." *Id.*

---

[6] If the issue of variance is not raised at trial, however, review is for plain error. *Caver*, 470 F.3d at 235. The parties have not indicated whether Robinson raised this issue at trial or, if he did, where in the record it appears. We find that, under either standard of review, Robinson has not shown that a variance occurred or that his rights were prejudiced.

1. *Existence of a Single Conspiracy*

"To prove a single conspiracy, the government need only show that each alleged conspirator had knowledge of and agreed to participate in what he knew to be a collective venture directed toward a common goal." *United States v. Smith,* 320 F.3d 647, 653 (6th Cir. 2002), *vacated and remanded on other grounds,* 510 U.S. 1180 (2005). "[A] single conspiracy does not become multiple conspiracies simply because each member of the conspiracy did not know every other member, or because each member did not know of or become involved in all of the activities in furtherance of the conspiracy." *Warner,* 690 F.2d at 549. Drug conspiracies "are often 'chain' conspiracies" which "normally involve numerous sales and resales of drugs until they reach the ultimate consumers." *Id.* "Because the success of participants on each level of distribution is dependent upon the existence of other levels of distribution, each member of the conspiracy must realize that he is participating in a joint enterprise, even if he does not know the identities of many of the participants." *Id.*

Here, the government proved that Robinson knew about and agreed to participate in a collective venture to sell cocaine in eastern Tennessee. The same evidence supporting a finding of Robinson's participation in the conspiracy supports a finding that there was a single conspiracy. Robinson cooperated with both Valentin and "downstream" sellers to maintain a profitable enterprise. Robinson helped Valentin acquire drugs, develop new customers, avoid

police detection, and collect money. These actions support the inference that Robinson wanted to protect Valentin's interests, at least so he could maintain him as a source. Also, Robinson made sure that he had enough cocaine to supply the dealers who were buying from him. The evidence points to a conclusion that there was an "interdependence of the enterprise," *Caver,* 470 F.3d at 233, and we cannot say that the evidence "can reasonably be construed *only* as supporting a finding of multiple conspiracies." *Id.* at 236 (quoting *Warner,* 690 F.2d at 548) (emphasis in original).

2. *Prejudice*

"[E]ven if a variance exists, it does not constitute reversible error 'unless it prejudices [the defendant's] substantial rights.'" *United States v. Lee,* 991 F.2d 343, 349 (6th Cir. 1993) (quoting *United States v. Guerra-Marez,* 928 F.2d 665, 671 (5th Cir. 1991)). "Moreover, 'if the government proves multiple conspiracies and a defendant's involvement in at least one of them, then clearly there is no variance affecting that defendant's substantial rights.'" *Id.*

Even assuming a variance, Robinson has failed to demonstrate how he has been prejudiced. This is not a case where there could be a danger of "transferred guilt" from evidence of multiple conspiracies in which Robinson was not involved. In any event, even if the evidence proved only multiple conspiracies, the

government has proved Robinson's involvement in at least one of them.

CONCLUSION

For the foregoing reasons, we **AFFIRM** Robinson's conviction and sentence.

United States District Court
Eastern District of Tennessee

UNITED STATES OF AMERICA
v.
CHRIS ROBINSON
a/k/a "WEBB"

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number:
4:06-CR-004-03

Paul D. Cross
Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s): _____

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[✓] was found guilty on counts(s) 1, 32, and 34 of the Superseding Indictment after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count No.(s)
21 U.S.C. §§846 & 841(b)(1)(A)	Conspiracy to Distribute Five Kilograms or More of Cocaine Hydrochloride	12/2003-3/2006	One
21 U.S.C. §§843(b)	Use of a Communication Device	05/19/05 05/24/05	Thirty-Two Thirty-Four

The defendant is sentenced as provided in pages 2 through 6 of this judgment and the Statement of Reasons. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. §3553.

[ ] The defendant has been found not guilty on count(s)__

[ ] Counts ____ [ ] is [ ] are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

04/05/2007
Date of Imposition of Judgment

/s/
Signature of Judicial Officer

CURTIS L. COLLIER, Chief
United States District Judge
Name & Title of Judicial Officer

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of LIFE. This sentence consists of a term of Life on Count One, and terms of 48 months on each of Counts 32 and 34, to be served concurrently.

[✓] The court makes the following recommendations to the Bureau of Prisons:

That the defendant receive 500 hours of substance abuse treatment from the BOP Institution Residential Drug Abuse Treatment Program.

[✓] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at _____ a.m. [ ] p.m. on _____.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on _____.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 8 years.

This term consists of a term of 8 years on Count One and terms of 3 years on each of Counts 32 and 34, all such terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of

release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[ ] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[✓] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)

[✓] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

[ ] The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set

forth below). The defendant shall also comply with the additional conditions on the attached pages.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and/or treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B. The assessment is ordered in accordance with 18 U.S.C. § 3013.

	Assessment	Fine	Restitution
Totals:	$300.00	$	$

[ ] The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, if the United States is a victim, all other victims, if any, shall receive full restitution before the United States receives any restitution, and all restitution shall be paid to the victims before any restitution is paid to a provider of compensation, pursuant to 18 U.S.C. § 3664.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
TOTALS:	$_____	$_____	

[ ] If applicable, restitution amount ordered pursuant to plea agreement. $ _____

The defendant shall pay interest on any fine or restitution of more than $2500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[ ] The interest requirement is waived for the [ ] fine and/or [ ] restitution.

[ ] The interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A [✓] Lump sum payment of $300.00 due immediately, balance due

[ ] not later than _____ , or

[✓] in accordance with [ ] C, [ ] D, or [ ] E or [✓] F below; or

B [ ] Payment to begin immediately (may be combined with [ ] C, [ ] D, or [ ] F below); or

C [ ] Payment in _____ (e.g., equal weekly, monthly, quarterly) installments of $ _____ over a period

of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within 0 (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [✓] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. Unless otherwise directed by the court, the probation officer, or the United States attorney, all criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, shall be made to **U.S. District Court, 200 S. Jefferson St., Room 201, Winchester, TN 37398**. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

No. 07-5474

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. CHRIS ROBINSON, Defendant-Appellant.	)))))))	ORDER (Filed Feb. 5, 2009)

BEFORE: GUY, BATCHELDER, and MCKEAGUE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT WINCHESTER

UNITED STATES OF AMERICA, Plaintiff, -versus- CHRIS ROBINSON, Defendant.	:	4:06-CR-4

Chattanooga, Tennessee
October 2, 2006

BEFORE: THE HONORABLE CURTIS L. COLLIER, CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

PERRY H. PIPER,
JAMES T. BROOKS,
Assistant United States Attorneys
1110 Market Street, Suite 301
Chattanooga, Tennessee 37402

FOR THE DEFENDANT:

H. GRAHAM SWAFFORD, JR., ESQ.
Swafford, Jenkins & Raines
32 Courthouse Square
Post Office Box 457
Jasper, Tennessee 37347-0457

JURY TRIAL
FIRST DAY OF TRIAL
EXCERPT OF PROCEEDINGS
OPENING STATEMENTS AND TESTIMONY

* * *

[40] A Yes, sir.

Q Now, back in August of '05, what we've talked about earlier – I'm going to hand to you Government's Exhibit 40. Tell me if you recognize Government's Exhibit 40, please, sir. What is Government's Exhibit 40, Agent Sowder?

A It is the 3 kilograms of cocaine that we took from Juan Valentin.

Q And where was that?

A That was in Rutherford County, on August 24th of 2005.

Q August 24th of '05? County seat of Rutherford County is?

A Murfreesboro.

Q Murfreesboro. Very good. Tell the jury how it came about that you-all stopped Juan Valentin with these 3 kilos of coke.

A What took place on August 24th is – we went down on July 31 – we were able to spin up Memphis DEA up on his source of supply. We got a phone call – I personally got a phone call from Special Agent Jim Shires with DEA in Memphis stating that his guy, meaning Mr. Giovani Caraballo, had had phone conversations with Mr. Juan Valentin stating that he was getting ready to make a trip to pick up cocaine in Memphis to take back to Tullahoma.

* * *

[49] Q Okay. And at some point – let me ask you this [50] question – did you know that Mr. Valentin – back before the August 2005 incident, did you and Agent Ledford learn that Mr. Valentin was coming back with 5 kilos of cocaine?

A Oh, yes, sir.

Q And that was based upon the wire?

A Yes, sir.

Q And what did you want to do at that point?

A I wanted to take him off.

Q Five kilos was the threshold quantity that we needed?

A Yes, sir.

Q And what happened when you wanted to take him off?

A Unfortunately there's people higher in the office making the decisions. Also, like I said, with Memphis DEA, their supervisors and my supervisors, they were really trying to get into Mexico, into their source of supply.

Q Okay. So did they allow you-all to take down this 5 kilos of coke?

A No, sir.

* * *

[61] Q Any connection with – At some point in time, they go to Memphis and get 3 kilos and a hundred pounds of marijuana. Any connection between my client and that?

A Like – Again, I don't know where the cocaine and marijuana was going back to once it got back.

Q To your knowledge –

A To my knowledge, no.

Q – the answer is no? Now, then, in regards to Exhibits 47 and 50, we have what appears to be 5 K of cocaine and the marijuana. No connection between my client – between these items. Is that correct?

A Yes, sir. Again, we have no idea who it was going back to once it got back.

* * *

[66] Q You say that the 3 kilos of coke that we have here and the other kilos of coke, that Mr. Robinson had no connection to that?

A No, sir, I did not say that he had no connection to it.

Q Okay. Well, Mr. Swafford asked you what connection he had to that. What involvement, what connection, did he have to this coke?

A This cocaine was coming back to Tullahoma to be distributed among Mr. Valentin's coconspirators, I believe.

* * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT WINCHESTER

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	4:06-CR-4
-versus-	:	
CHRIS ROBINSON,	:	
Defendant.	:	

Chattanooga, Tennessee
October 3, 2006

BEFORE: THE HONORABLE CURTIS L. COLLIER, CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

PERRY H. PIPER,
JAMES T. BROOKS,
Assistant United States Attorneys
1110 Market Street, Suite 301
Chattanooga, Tennessee 37402

FOR THE DEFENDANT:

H. GRAHAM SWAFFORD, JR., ESQ.
Swafford, Jenkins & Raines
32 Courthouse Square
Post Office Box 457
Jasper, Tennessee 37347-0457

JURY TRIAL
SECOND DAY OF TRIAL
EXCERPT OF PROCEEDINGS
TESTIMONY, CLOSING ARGUMENTS,
AND JURY CHARGE

* * *

[254] MR. PIPER: Thank you.

I do want to talk briefly about quantity. Five kilos of powder cocaine. Forget about the two keys they pick up in Memphis. Forget about the half key or quarter key he gets with Chris – with Troy Allison. Let's just look at the four and a half ounces that he primarily got every week from December of '03, which is the dates in the conspiracy, to – and he stopped in August of '05. Doesn't go all the way to March of '06. So you've got roughly – Let's say it's 18 months, or 75 weeks. And if I think – 75 times 4 is 300 ounces. You heard testimony there's 36 ounces in a kilogram. So therefore he's roughly at 8 or 9 ounces [sic]. I asked David Sowder to figure this out in his head. Isaac Newton here had a hard time with that. But I'm giving him a hard time. When he was on the stand, he had kind of balked a [255] little bit about doing the math in his head.

* * *

[269] If you determine defendant is guilty of the offense charged in Count 1, you must then determine whether that offense involved the particular quantity of drugs charged in the indictment. In Count 1 defendant is charged with conspiring to distribute 5 kilograms or more of a mixture and substance containing a detectable amount of cocaine hydrochloride. On the verdict form I have asked you to answer some questions about the amount of the mixture and substance containing a detectable amount of cocaine hydrochloride in this offense. In determining the amount of controlled substance involved in each of these crimes, you should consider all of my previous instructions regarding the [270] consideration of evidence. You should only answer yes to one of these questions on the verdict form if you determine, first, that defendant is guilty beyond a reasonable doubt of the particular offense charged in the indictment, and, second, that the government has proven beyond a reasonable doubt that the offense involved the specified quantity of a mixture and substance containing a detectable amount of cocaine hydrochloride listed in the question.

* * *

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT WINCHESTER

UNITED STATES OF AMERICA, Plaintiff, -versus- CHRIS ROBINSON, Defendant.	4:06-CR-4

Chattanooga, Tennessee
October 3, 2006

BEFORE: THE HONORABLE
CURTIS L. COLLIER,
CHIEF UNITED STATES
DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

PERRY H. PIPER,
JAMES T. BROOKS,
Assistant United States Attorneys
1110 Market Street, Suite 301
Chattanooga, Tennessee 37402

FOR THE DEFENDANT:

H. GRAHAM SWAFFORD, JR., ESQ.
Swafford, Jenkins & Raines
32 Courthouse Square
Post Office Box 457
Jasper, Tennessee 37347-0457

JURY TRIAL
SECOND DAY OF TRIAL
EXCERPT OF PROCEEDINGS

DISCUSSION REGARDING
COMMUNICATION FROM THE JURY

[2] (The proceedings continued outside the presence of the jury, as follows:)

THE COURT: Please be seated.

A communication has been received from the jury. The communication asks whether the defendant must have knowledge or direct involvement with selling a drug quantity. From the question, it appears that they have – the question relates to the drug quantity charge. The court has prepared an instruction that, first of all, deals with the conspiracy charge and then, secondly, the drug quantity charge.

Mr. Piper, have you had a chance to review the court's proposed response?

MR. PIPER: I have, Your Honor.

THE COURT: Does the government have any suggestions or objections?

MR. PIPER: We have no objection to it, Your Honor. I thought that the court might want to add some "reasonable foreseeability" language. I talked it over with Mr. Brooks. He does not believe the Court needs to do that, that the suggested response by the court is sufficient.

THE COURT: The court has always been impressed by Mr. Brooks' wisdom and maturity. I think this is another example of it.

Mr. Swafford?

MR. SWAFFORD: Nobody has ever been impressed with my [3] academics, but I've been around a long time.

Respectfully, we feel that knowledge is required. And we insist that although it talks of 5 K in the question, we feel that this question is – basically goes to this issue of the conspiracy. We feel that the answer should be yes. And we're asking that the "yes" be as effusive as we can possibly get you to do. But being all that as it may, I've got this U. S. v. Rystick case. It says the government must prove an agreement between two or more acting together to commit. So that is one of the keys to a conspiracy; you've got to have participation, agreement, and some type of knowledge. Those are the three elements that were there. And we feel that as a matter of law you can't be convicted of a conspiracy if you just don't know. Might look bad, but, still, you don't know. I guess that was one of the things I was trying to point out about the famous Red Hot Truck Stop comment – "Gosh, you

know, we didn't know anything was going on out there." I insist that that basically is a defense to conspiracy – we didn't know. Thank you.

THE COURT: Well, on the first paragraph of the proposed instruction, the last sentence says the essence of the conspiracy is the agreement. So this reemphasizes with the jury that to find the defendant guilty of the conspiracy, you must find that he voluntarily and intentionally joined some conspiracy. Then the second paragraph tells the jury that if [4] they determine that he did participate in a conspiracy, they are called upon to determine what was the quantity of drugs involved in the conspiracy the defendant participated in. That conspiracy the defendant participated in would have to be the conspiracy that he agreed, not the conspiracy that may have taken on others with which he had no knowledge and with which he was not in agreement with. So the Court believes that this instruction does correctly state the law and also responds to the jury's question. Let me go ahead, then, and sign the communication, and I'll have Ms. Palmer deliver the communication to the jury.

MR. PIPER: Judge, could you read the communication into the record?

THE COURT: Did I do it?

MR. PIPER: Yes, sir.

THE COURT: I did not. I can if you'd like me to.

MR. PIPER: I would, Your Honor. I'm talking about the Court's communication back to the jury.

THE COURT: "You have asked whether Mr. Robinson must have knowledge of the selling of 5 kilograms of cocaine hydrochloride or if he has to have direct involvement with selling 5 kilograms of cocaine hydrochloride. With respect to the conspiracy, the instructions indicate that the government must prove that two or more persons conspired or agreed to commit the crime of distributing cocaine hydrochloride, the [5] defendant knowingly joined the conspiracy, and the defendant voluntarily and intentionally participated in the conspiracy. Again, the essence of the conspiracy is the agreement, not the accomplishment of the act.

"Concerning the drug quantities, you are merely to determine what quantity was involved in the conspiracy the defendant participated in, in the event you find he participated in a conspiracy."

MR. PIPER: Thank you, Your Honor.

MR. SWAFFORD: Thank you.

THE COURT: Ms. Palmer, you may deliver this to the jury. And you can put us in recess.

END OF EXCERPT

I, Elizabeth B. Coffey, do hereby certify that I reported in machine shorthand the proceedings in the

above-styled cause, and that this transcript is an accurate record of said proceedings.

Elizabeth B. Coffey,
Official Court Reporter

Supreme Court, U.S.
FILED
JUL 23 2009
OFFICE OF THE CLERK

No. 08-1374

In the Supreme Court of the United States

CHRIS ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
DEMETRA LAMBROS
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, in a drug conspiracy prosecution under 21 U.S.C. 846, the imposition of an enhanced sentence based on the quantity of drugs involved in the offense requires the jury to find the quantity of drugs attributable to the conspiracy as a whole, or the quantity of drugs attributable to the defendant himself.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 18

TABLE OF AUTHORITIES

Cases:

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 5, 9
Derman v. *United States*, 298 F.3d 34 (1st Cir.), cert. denied, 537 U.S. 1048 (2002) 10, 11, 14
Edwards v. *United States*, 523 U.S. 511 (1998) 10
Garrett v. *United States*, 471 U.S. 773 (1985) 12
Iannelli v. *United States*, 420 U.S. 770 (1975) 12
Neder v. *United States*, 527 U.S. 1 (1999) 18
Pinkerton v. *United States*, 328 U.S. 640 (1946) 7, 11
Smith v. *United States*, 508 U.S. 223 (1993) 12
United States v. *Banuelos*, 322 F.3d 700 (9th Cir. 2003) 13, 14
United States v. *Becerra*, 992 F.2d 960 (9th Cir. 1993) 13, 14
United States v. *Carranza*, 289 F.3d 634 (9th Cir.), cert. denied, 537 U.S. 1037 (2002) 9
United States v. *Collins*, 415 F.3d 304 (4th Cir. 2005) 11, 13, 14
United States v. *Colon-Solis*, 354 F.3d 101 (1st Cir. 2004) 15
United States v. *Cotton*, 535 U.S. 625 (2002) 9, 10

Cases—Continued: Page

United States v. *Feola*, 420 U.S. 671 (1975) 9
United States v. *Gamez-Gonzalez*, 319 F.3d 695 (5th Cir.), cert. denied, 538 U.S. 1068 (2003) 9
United States v. *Jimenez Recio*, 537 U.S. 270 (2003) 12
United States v. *Knight*, 342 F.3d 697 (7th Cir. 2003), cert. denied, 540 U.S. 1227 (2004) 14
United States v. *Mercado Irizarry*, 404 F.3d 497 (1st Cir. 2005) 11
United States v. *Nelson-Rodriguez*, 319 F.3d 12 (1st Cir.), cert. denied, 539 U.S. 928, 540 U.S. 831, and 540 U.S. 845 (2003) 11, 16
United States v. *Olano*, 507 U.S. 725 (1993) 16
United States v. *O'Neal*, 362 F.3d 1310 (11th Cir. 2004), vacated on other grounds by *Sapp* v. *United States*, 543 U.S. 1106 (2005) 15
United States v. *Phillips*, 349 F.3d 138 (3d Cir. 2003), vacated on other grounds by *Barbour* v. *United States*, 543 U.S. 1102 (2005) 14
United States v. *Pruitt*, 156 F.3d 638 (6th Cir. 1998), cert. denied, 525 U.S. 1091, and 526 U.S. 1012 (1999) 7, 13
United States v. *Rivera*, 411 F.3d 864 (7th Cir.), cert. denied, 546 U.S. 966 (2005) 15
United States v. *Seymour*, 519 F.3d 700 (7th Cir.), cert. denied, 129 S. Ct. 527 (2008) 14
United States v. *Shabani*, 513 U.S. 10 (1994) 12
United States v. *Stiger*, 413 F.3d 1185 (10th Cir. 2004), cert. denied, 546 U.S. 1049 (2005) 14

Cases—Continued: Page

United States v. *Swiney*, 203 F.3d 397 (6th Cir.), cert. denied, 530 U.S. 1238, and 530 U.S. 1268 (2000) 15
United States v. *Turner*, 319 F.3d 716 (5th Cir.), cert. denied, 538 U.S. 1017 (2003) 14

Statutes, rule and guidelines:

Wisniewski v. *United States*, 353 U.S. 901 (1957) 13
21 U.S.C. 841 12
21 U.S.C. 841(a) 6
21 U.S.C. 841(a)(1) 6, 8
21 U.S.C. 841(b) 8, 13, 14
21 U.S.C. 841(b)(1) 13
21 U.S.C. 841(b)(1)(A) 3, 5, 6, 8
21 U.S.C. 841(b)(1)(A)(ii) 6, 17
21 U.S.C. 841(b)(1)(C) 6
21 U.S.C. 843(b) 2
21 U.S.C. 846 ..... 1, 6, 8, 9, 12
21 U.S.C. 851(a)(1) 3
Fed. R. Crim. P. 52(b) 16
United States Sentencing Guidelines:
§ 2D1.1, comment. 17
§ 4B1.1(a) 5
§ 4B1.1(b) 5

In the Supreme Court of the United States

No. 08-1374

CHRIS ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 547 F.3d 632.

JURISDICTION

The judgment of the court of appeals was entered on November 24, 2008. A petition for rehearing was denied on February 5, 2009 (Pet. App. 32). The petition for a writ of certiorari was filed on May 5, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of one count of conspiring to distribute five or more kilograms of cocaine, in violation of 21 U.S.C. 846, and two counts of using a communications

facility to facilitate the distribution of controlled substances, in violation of 21 U.S.C. 843(b). He was sentenced to life imprisonment. Pet. App. 21-22. The court of appeals affirmed. *Id.* at 1-20.

1. In December 2003, petitioner entered into "a business relationship" with Juan Valentin "in which the two of them worked together to sell cocaine." Pet. App. 3. After that, Valentin sold cocaine to petitioner "once or twice a week," in amounts ranging from one to nine ounces, with four-and-one-half ounces being the most typical quantity. *Ibid.*; C.A. App. 315-318. Valentin sometimes extended credit to petitioner to make the purchases. Pet. App. 3. At trial, the jury heard a series of intercepted telephone conversations from an 88-day period during 2005. During those conversations, petitioner and Valentin discussed the sale of at least 38.5 ounces of cocaine and referred repeatedly to other conversations that were not recorded. *Id.* at 3 n.2; C.A. App. 263, 297-298, 334-336. Valentin testified that he and petitioner also used text messages, which were not intercepted by the wiretap, to conduct their drug business and that they did so about as often as they spoke via phone. *Id.* at 239-241.

Valentin and petitioner worked together in other ways as well. On one occasion, petitioner accompanied Valentin to Memphis to pick up "a couple kilos" of cocaine, Pet. App. 3, and the recorded conversations make clear that petitioner was aware of other cocaine-buying trips by Valentin and others, C.A. App. 266-267, 271, 280-282, 308-309, 311-312. Petitioner introduced Valentin to Troy Allison, who bought a quarter of a kilogram of cocaine from Valentin during their first meeting and "ultimately buil[t] up to" buying a kilogram at a time and making at least one two-kilogram purchase. Pet.

App. 3 n.1. Valentin asked and petitioner agreed to help Valentin collect money from several people to whom Valentin had sold cocaine on credit. *Id.* at 4; C.A. App. 261-262, 265-267, 277-278, 293-296. Petitioner also warned Valentin about police investigations into Valentin's activities, and the two conferred about how Valentin could retrieve $30,000 in drug proceeds from an impounded car. Pet. App. 4; C.A. App. 267-271.

2. A grand jury returned a 53-count superseding indictment against petitioner and 18 others. Count 1 charged all of the defendants with conspiring to distribute "five kilograms or more" of cocaine between December 2003 and March 2006. Superseding Indictment 1-2; Pet. App. 2. In September 2006, the government gave notice under 21 U.S.C. 851(a)(1) that it intended to seek enhanced statutory penalties against petitioner based on his two prior felony drug convictions. See 9/26/2006 Notice of Intent to Use Prior Convictions to Enhance Punishment; see 21 U.S.C. 841(b)(1)(A) (providing that a person who is convicted of a drug trafficking offense involving five or more kilograms of cocaine and has "two or more prior convictions for a felony drug offense * * * shall be sentenced to a mandatory term of life imprisonment").

In its charge to the jury, the district court described the elements of a conspiracy offense, see 10/3/06 Tr. 266-269, and stated that "the government must prove [each] * * * element[] beyond a reasonable doubt," *id.* at 266. The court told the jury that if it found that petitioner was "guilty of the offense charged in Count 1, you must then determine whether that offense involved the particular quantity of drugs charged in the indictment." Pet. App. 4. The court noted that the verdict form "asked you to answer some questions about the amount of the

mixture and substance containing a detectable amount of cocaine hydrochloride in this offense," and it stated that the jury "should only answer yes to one of th[ose] questions * * * if you determine * * * that the government has proven beyond a reasonable doubt that the offense involved the specified quantity * * * listed in the question." *Id.* at 4-5. Petitioner did not object to those instructions or to the verdict form.

During its deliberations, the jury sent a note to the court inquiring: "Does [petitioner] simply have to have knowledge of the selling of 5 kilos or does he have direct involvement with selling 5 kilos." 10/3/06 Communications with the Court. Defense counsel asserted that "knowledge is required," that "the answer should be yes," and that "as a matter of law you can't be convicted of a conspiracy if you just don't know." Pet. App. 43. In its response to the jury's question, the court stated that "the essence of the conspiracy is the agreement, not the accomplishment of the act" and that, "[c]oncerning the drug quantities, you are merely to determine what quantity was involved in the conspiracy the defendant participated in, in the event you find he participated in a conspiracy." *Id.* at 45.

The jury found petitioner guilty on the conspiracy count, as well as two other counts. Pet. App. 6, 21. On the verdict form, the jury checked "Yes" in response to the question: "Do you, the jury, unanimously find the Government has proved beyond a reasonable doubt that the offense charged in Count 1 of the Indictment involved five kilograms or more of a mixture or substance containing cocaine hydrochloride?" *Id.* at 5-6; Verdict Form 1.

The probation officer prepared a Presentence Investigation Report (PSR). The PSR determined that peti-

tioner was a "career offender" under Guidelines § 4B1.1(a) and (b), see PSR paras. 74, 80, which produced an advisory Guidelines range of 360 months to life imprisonment, see PSR para. 94. The PSR also concluded, however, that petitioner was subject to a mandatory term of life imprisonment under 21 U.S.C. 841(b)(1)(A) in light of the jury's drug-quantity finding and his two previous felony drug convictions, which meant that "the effective guideline range is life." PSR para. 94. In his written Response to Pre-Sentence Report, petitioner objected to the use of his previous convictions for sentencing purposes because they had not been found by either the grand jury or the petit jury. Addendum to the PSR; Response to Pre-Sentence Report. Petitioner did not, however, object to the use of the jury's drug-quantity finding for purposes of determining his sentence.

At the sentencing hearing, petitioner argued that he was not the person who had been the subject of the two convictions relied upon by the government. 4/5/07 Tr. 4, 36-38. The district court rejected that contention, and found that petitioner "is the defendant whose convictions are listed in the presentence report." *Id.* at 38. The district court also rejected petitioner's argument that, under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), his prior convictions had to be found by the jury, rather than by the court. 4/5/07 Tr. 42-43. At that point, petitioner conceded that a life sentence was mandatory "under the statute, 21 U.S.C. 841," and the district court sentenced petitioner to life imprisonment. *Id.* at 43-44. At no point during the sentencing hearing did petitioner object to the use of the jury's drug-quantity finding for purposes of determining his sentence.

3. On appeal, petitioner argued that the district court had erred, both in its initial instructions and in its response to the jury's question, in charging the jury that it was required to determine the amount of cocaine involved in the conspiracy as a whole rather than the amount of cocaine that was foreseeable to him personally. See Pet. C.A. Br. 10, 12-16. As a remedy, petitioner sought either reversal of his conspiracy conviction, see *id.* at 16, or a remand for resentencing under 21 U.S.C. 841(b)(1)(C), which covers offenses involving an indeterminate quantity of cocaine, see Pet. C.A. Br. 16.

The court of appeals rejected petitioner's contention and upheld his conviction and sentence. Pet. App. 6-13. The district court's instructions had "tracked the language of" 21 U.S.C. 841(b)(1)(A), see Pet. App. 7, which provides for an enhanced sentence "[i]n the case of a violation * * * *involving* * * * 5 kilograms or more" of cocaine, 21 U.S.C 841(b)(1)(A)(ii) (emphasis added). The court of appeals explained that 21 U.S.C. 846, the drug-conspiracy statute, provides that conspirators "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the * * * conspiracy," and that 21 U.S.C. 841(a)(1), which describes the underlying substantive offense, makes it "unlawful for any person knowingly or intentionally—to . . . distribute . . . a controlled substance." Pet. App. 7. Accordingly, the court of appeals determined that the district court properly "instructed the jury that the relevant quantity determination is of the quantity involved in the violation of 21 U.S.C. § 841(a)—in this case, a conspiracy to distribute cocaine." *Id.* at 8.

The court of appeals determined that neither its own decision in *United States* v. *Pruitt*, 156 F.3d 638 (6th Cir. 1998), cert. denied, 525 U.S. 1091, and 526 U.S. 1012 (1999) nor *Pinkerton* v. *United States*, 328 U.S. 640 (1946), required a different result. See Pet. App. 8-10. The court acknowledged "that a conspirator is liable for the substantive offenses of his conspirators only if those offenses are, among other things, reasonably foreseeable to him." *Id.* at 9 (citing *Pinkerton*, 328 U.S. at 647-648). But the court explained that "this principle is distinct from the equally established rule that conspiracy is an inchoate offense that needs no substantive offense for its completion," *ibid.*, and it noted that *Pruitt* had "distinguished culpability for the conspiracy itself from culpability for the substantive offenses of co-conspirators," *id.* at 10.

The court of appeals also rejected petitioner's assertion that the district court's drug-quantity instructions violated *Apprendi*. Pet. App. 10-13. The court explained that "the 'fact' that increases the default penalty for a conspiracy to distribute drugs is the quantity of drugs involved in the conspiracy," and it noted that "[m]ost other circuits have agreed that *Apprendi* is satisfied where the jury finds, beyond a reasonable doubt, the quantity of drugs involved in the conspiracy as a whole." *Id.* at 11; see *id.* at 12 (citing cases). The court of appeals stated "there can be no *Apprendi* error" in this case because the jury's quantity finding, in conjunction with petitioner's two prior convictions, had "triggered a mandatory life sentence." *Ibid.* As a result, "the district court had no occasion to determine the amount * * * of drugs for which [petitioner] was personally responsible because there was no range within

which the court had discretion to choose a sentence." *Ibid.*[1]

ARGUMENT

Petitioner contends (Pet. 7-16) that he was not subject to an enhanced sentence under 21 U.S.C. 841(b)(1)(A) because the jury was asked to determine the amount of drugs involved in the conspiracy as a whole rather than those that were reasonably foreseeable to him. That claim does not merit further review.

1. a. Petitioner's argument is contrary to the plain language of the drug statutes. The drug-conspiracy statute states that conspirators "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the * * * conspiracy." 21 U.S.C. 846. As relevant here, 21 U.S.C. 841(a)(1) makes it "unlawful for any person knowingly or intentionally * * * to * * * distribute * * * a controlled substance." Section 841(b), in turn, establishes the penalties for "any person who violates subsection (a)," and states that those penalties turn on the type and amount of drugs "involv[ed]" in the "violation." 21 U.S.C. 841 (b)(1)(A). The statutes thus make clear that, in drug-distribution conspiracy cases, the statutory maximum depends on the type and amount of drugs involved in the conspiracy. No language in either statute suggests that the statutory maximum varies depending on the amount of drugs that are reasonably foreseeable to each individual conspirator.

b. The court of appeals' reading of the statutes is consistent with "the long established rule that," in substantive drug-trafficking cases, "the government need

---

[1] The court of appeals also rejected various other claims that petitioner does not renew in this Court. See Pet. App. 13-20.

not prove that the defendant knew the * * * *amount* of [the] controlled substance" involved in his offense. *United States* v. *Carranza*, 289 F.3d 634, 644 (9th Cir.), cert. denied, 537 U.S. 1037 (2002); see *ibid.* (stating that this rule survives *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)); see also *United States* v. *Gamez-Gonzalez*, 319 F.3d 695, 699-700 (5th Cir.) (citing cases), cert. denied, 538 U.S. 1068 (2003). Because the government is not required to prove that the defendant knew the particular quantities involved in a prosecution for the underlying substantive offense, it likewise should not be required to establish such knowledge or foreseeability in a prosecution for conspiracy to commit that offense. Cf. *United States* v. *Feola*, 420 U.S. 671, 696 (1975) (stating that "where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a mens rea requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense").

c. *United States* v. *Cotton*, 535 U.S. 625 (2002), also supports the decision below. In *Cotton*, this Court held that the imposition of life sentences on defendants convicted of conspiracy under 21 U.S.C. 846 did not warrant relief under the plain-error standard, even though the drug amount was not alleged in the indictment or found by the jury, because the "overwhelming" and "essentially uncontroverted" evidence showed that "the conspiracy involved at least 50 grams of cocaine base." 535 U.S. at 633. The Court's analysis focused on the drug quantity involved in the conspiracy as a whole. Three separate times the Court referred to the fact that "the conspiracy involved at least 50 grams of cocaine base." *Ibid.*; see *ibid.* (evidence "revealed the conspiracy's involvement with far more than 50 grams of cocaine

base"); *id.* at 633 n.3 ("the relevant quantity for purposes of *Apprendi*" was the amount of cocaine "that the conspiracy involved"). Nothing in the Court's reasoning suggested that the statutory penalties for the conspiracy would vary depending on the quantity of cocaine base attributable to each defendant. To the contrary, the Court stated that "the relevant quantity for purposes of *Apprendi*" was the amount of cocaine "that the conspiracy involved." *Ibid.*

d. Contrary to petitioner's suggestion (see Pet. 9-10), *Edwards* v. *United States*, 523 U.S. 511 (1998), supports the court of appeals' conclusion that the statutory maximum for a drug conspiracy is determined based on the drug type and quantity involved in the conspiracy as a whole. As the First Circuit explained in *Derman* v. *United States*, 298 F.3d 34, cert. denied, 537 U.S. 1048 (2002), *Edwards* holds that

> [A]s long as (1) the jury finds beyond a reasonable doubt that a defendant participated in a conspiracy, and (2) the Court sentences him within the statutory maximum *applicable to that conspiracy*, the court may "determine both the amount and the kind of 'controlled substances' for which the defendant should be held accountable—and then . . . impose a sentence that varies depending upon amount and kind."

Id. at 42 (brackets omitted) (quoting *Edwards*, 523 U.S. at 513-514); see *Edwards*, 523 U.S. at 515 (noting that the petitioners' sentences did not exceed "the maximum that the statutes permit for a cocaine-only conspiracy").

As the First Circuit further explained, *Apprendi* "did not purport to overrule *Edwards*." *Derman*, 298 F.3d at 42. Instead, the two decisions are "easily harmonized." *Ibid.* "[I]n a drug conspiracy case, the jury should de-

termine the existence *vel non* of the conspiracy as well as any facts about the conspiracy that will increase the possible penalty for the crime of conviction beyond the default statutory maximum." *Ibid.* Then, "once the jury has determined that the conspiracy involved a type and quantity of drugs sufficient to justify a sentence above the default statutory maximum and has found a particular defendant guilty of participation in the conspiracy, the judge lawfully may determine the drug quantity attributable to that defendant and sentence him accordingly" within the applicable statutory maximum set by "the jury's conspiracy-wide drug quantity determination." *Id.* at 43.[2] As the court of appeals recognized (Pet. App. 12), so long as this procedure is followed, "there can be no *Apprendi* error."

e. The court of appeals also correctly rejected petitioner's reliance (Pet. 14-15) on *Pinkerton* v. *United States*, 328 U.S. 640 (1946). *Pinkerton* holds that a defendant is substantively liable for the reasonably foreseeable criminal acts of a co-conspirator in furtherance of the conspiracy. *Id.* at 647-648. As the court of appeals recognized, however, "[t]he principles outlined in *Pinkerton* . . . have no applicability to a conviction under § 846." Pet. App. 9 (quoting *United States* v. *Col-*

---

[2] Petitioner errs in suggesting (Pet. 11) that the First Circuit has retreated from its holding in *Derman*. The very decision upon which petitioner relies reaffirms that *Derman* remains the law of the First Circuit. See *United States* v. *Nelson-Rodriguez*, 319 F.3d 12, 46, cert. denied, 539 U.S. 928, 540 U.S. 831, and 540 U.S. 845 (2003); see also *United States* v. *Mercado Irizarry*, 404 F.3d 497, 504 (2005) ("As the case law of this circuit has made abundantly clear, the maximum statutory penalty available to the district court at sentencing for a defendant convicted of a drug conspiracy is based on the drug quantity and amount reflected in the jury verdict attributable to the conspiracy as a whole.").

lins, 415 F.3d 304, 313 (4th Cir. 2005)). This Court has affirmed repeatedly that "conspiracy is a distinct offense from the completed object of the conspiracy," *Garrett* v. *United States*, 471 U.S. 773, 778 (1985), and "that conspiracy is an inchoate offense that needs no substantive offense for its completion." Pet. App. 9-10 (citing *Iannelli* v. *United States*, 420 U.S. 770, 777 & n.10 (1975)); see *United States* v. *Jiminez Recio*, 537 U.S. 270, 274-275 (2003) (conspiracy may be proved based on the unlawful agreement, regardless of whether the substantive offense is committed); *United States* v. *Shabani*, 513 U.S. 10, 13-14 (1994) (holding that no overt act is necessary for conspiracy liability under Section 846). A drug conspirator's liability rests on his agreement, and once it is established that he knowingly and voluntarily became a part of a conspiratorial agreement, he is liable for the full scope of the conspiracy that he joined. Accordingly, "[a]lthough a 'small-time' drug seller may not be responsible for all the transactions or actions of his associates, he is responsible for the conspiracy in which he participated." Pet. App. 10.

f. Petitioner also observes (Pet. 12) that the Sentencing Guidelines "impose a foreseeability limitation on relevant conduct." The question here, however, involves the proper interpretation of a statute. The text of Section 841 imposes no such limitation, and the Court has described as "dubious" the assumption that the meaning of a statute's text can be deduced from different language in the Guidelines. *Smith* v. *United States*, 508 U.S. 223, 231 (1993).

2. Petitioner argues (Pet. 7-9) that this Court's review is warranted because the court of appeals' decision

conflicts with decisions of other courts of appeals.[3] Although there is disagreement, this case is not an appropriate vehicle for resolving it.

a. As petitioner notes (Pet. 7-8), the decision below conflicts with *United States* v. *Collins*, *supra*. In *Collins*, the Fourth Circuit held that, in order to impose the enhanced statutory maximums in 21 U.S.C. 841(b) on a defendant convicted of a drug conspiracy, a jury must determine the quantity of drugs attributable to that particular defendant based on the co-conspirator liability principles set forth in *Pinkerton*. See *Collins*, 415 F.3d at 311-314. The Ninth Circuit reached a similar conclusion in *United States* v. *Banuelos*, 322 F.3d 700 (2003), which held that, when a defendant pleads guilty to a drug conspiracy, *Apprendi* requires the district court to determine beyond a reasonable doubt the quantity of drugs attributable or reasonably foreseeable to the defendant in order to subject him to the enhanced statutory penalties in 21 U.S.C. 841(b)(1). See 322 F.3d at 704-705.[4] In contrast, the majority of the courts of ap-

---

[3] Petitioner's assertion (Pet. 15) that the court of appeals' decision "violated the spirit if not the letter of its" own previous decision in *United States* v. *Pruitt*, 156 F.3d 638 (6th Cir. 1998), cert. denied, 525 U.S. 1091, and 526 U.S. 1012 (1999), provides no basis for further review. The court of appeals specifically distinguished *Pruitt* (Pet. App. 8-9), and an intracircuit conflict would not warrant a grant of certiorari in any event. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

[4] As petitioner observes (Pet. 8-9), *Banuelos* cited the Ninth Circuit's previous decision in *United States* v. *Becerra*, 992 F.2d 960 (1993), which *Banuelos* summarized as holding that a district "court may not impose [a] statutory mandatory minimum without finding that 'a particular defendant had some connection with the larger amount on which the sentencing is based or that he could reasonably foresee that such an amount would be involved in the transactions of which he was guilty.'"

peals that have considered the question have held, in accord with the court of appeals in this case, that the statutory maximum penalty in a drug conspiracy case turns on the jury's determination of the type and quantity of drugs involved in the conspiracy as a whole.[5]

For the reasons stated above, the majority view is correct and *Collins* and *Banuelos* are incorrect. The *Collins* and *Banuelos* courts did not examine the language of the drug statutes, nor did they discuss the well-reasoned, contrary decisions of other courts of appeals. *Collins* did not adequately explain why *Pinkerton* principles should apply in determining the penalty for conviction of a drug conspiracy; indeed, *Collins* itself recognized that "*Pinkerton* principles are relevant when a conspirator is charged with a substantive offense arising from the actions of a coconspirator, not when a conspirator is charged with conspiracy." 415 F.3d at 313.[6]

Banuelos, 322 F.3d at 704 (quoting *Becerra*, 992 F.2d at 967 n.2). Petitioner does not assert that the court of appeals' decision conflicts with *Becerra*, however, or any other circuit decisions involving the requirements for imposing an enhanced *minimum* sentence under 21 U.S.C. 841(b). See note 6, *infra*.

[5] See *United States* v. *Seymour*, 519 F.3d 700, 709-710 (7th Cir.), cert. denied, 129 S. Ct. 527 (2008); *United States* v. *Stiger*, 413 F.3d 1185, 1192-1193 (10th Cir.), cert. denied, 546 U.S. 1049 (2005); *United States* v. *Phillips*, 349 F.3d 138, 140-143 (3d Cir. 2003), vacated on other grounds by *Barbour* v. *United States*, 543 U.S. 1102 (2005); *United States* v. *Knight*, 342 F.3d 697, 709-712 (7th Cir. 2003), cert. denied, 540 U.S. 1227 (2004); *United States* v. *Turner*, 319 F.3d 716, 721-723 (5th Cir.), cert. denied, 538 U.S. 1017 (2003); *Derman*, 298 F.3d at 42-43.

[6] Petitioner also suggests (Pet. 12) that this case is different from the typical one because here the conspiracy-wide quantity finding not only resulted in "an elevated statutory maximum" but also "mandated a life sentence as a *minimum* punishment." Although petitioner did not raise the point in the district court, the court of appeals, or his petition

b. Although there is a conflict in the circuits, this case is not an appropriate vehicle for resolving it. First, petitioner has not properly preserved the claim on which he seeks this Court's review. Petitioner did not object

---

for a writ of certiorari, the district court's imposition of a mandatory life sentence based on the jury's conspiracy-wide drug-quantity finding also appears to conflict with another line of cases addressing the criteria for triggering mandatory minimum sentences under the federal drug statutes. In *United States* v. *Colon-Solis*, 354 F.3d 101, 103 (2004), for example, the First Circuit held that although "the applicable statutory maximum" in a drug-conspiracy case is based on conspiracy-wide drug quantity, a district court may not sentence a particular conspirator to a mandatory minimum sentence unless it makes a "specific finding, supportable by a preponderance of the evidence, ascribing the triggering amount to that coconspirator." Accord *United States* v. *O'Neal*, 362 F.3d 1310, 1316 (11th Cir. 2004), vacated on other grounds by *Sapp* v. *United States*, 543 U.S. 1106 (2005). But see *United States* v. *Rivera*, 411 F.3d 864, 866-867 (7th Cir.), cert. denied, 546 U.S. 966 (2005). In a pre-*Apprendi* series of cases, moreover, several courts of appeals held that a sentencing court must apply *Pinkerton* principles to make a defendant-specific determination of a drug conspirator's culpability before sentencing him to a mandatory minimum under Section 841(b). See, *e.g.*, *United States* v. *Swiney*, 203 F.3d 397, 405-406 (6th Cir.) (citing cases), cert. denied, 530 U.S. 1238, and 530 U.S. 1268 (2000).

For the reasons discussed in the text, those decisions are inconsistent with the plain language of the drug statutes and they wrongly transfer *Pinkerton*'s rule permitting conspirators to be held liable for a co-conspirator's *substantive* offenses to the very different question of what sentence may be imposed on a conspirator for the *conspiracy* itself. In addition, because the language of the drug statutes makes no distinction between the findings necessary to trigger enhanced maximum and minimum sentences, no textually sound basis justifies using a conspiracy-wide amount to set the maximum sentence, but a defendant-specific amount to establish a minimum sentence. At any rate, any claim directed specifically at the mandatory minimum sentence would be forfeited in light of petitioner's failure to raise the issue at any point during this litigation, and any conceivable error would be harmless as well. See pp. 16-18, *infra*.

to the district court's jury instructions or to the verdict form, both of which told the jury that it was to determine whether the conspiracy as a whole "involved" at least five kilograms of cocaine. See Pet. App. 4. In response to the jury's question, defense counsel argued that "knowledge is required" and asserted "that the answer should be yes." *Id.* at 43. But defense counsel did not argue in favor of a foreseeability standard (as petitioner seemingly does now, see Pet. 14-16), and the jury's question could not be answered "yes," as it posed alternative possible formulations. See 10/3/06 Communications with the Court ("Does [petitioner] simply have to have knowledge of the selling of 5 kilos or does he have direct involvement with selling 5 kilos."). And after the jury returned its verdict, petitioner never argued that the district court could not rely on the jury's drug-quantity finding for purposes of calculating his statutory sentencing range. To the contrary, petitioner *conceded* that he was subject to a mandatory life term after the district court rejected his objections to considering his prior convictions. 4/5/07 Tr. 43-44. As a result, petitioner's claim is reviewable only under the plain-error standard, see Fed. R. Crim. P. 52(b), and, even if petitioner could demonstrate "error," he could not satisfy his burden of showing that it was "clear" or "obvious." *United States* v. *Olano*, 507 U.S. 725, 734 (1993).

Second, even if petitioner's claim were preserved, any possible error in this case would have been harmless. Because petitioner was tried alone, the evidence focused on his particular involvement in the cocaine-distribution conspiracy. Cf. *United States* v. *Nelson-Rodriguez*, 319 F.3d 12, 46-47 (1st Cir.) (noting possible need for defendant-specific "special interrogatories" about drug quantity in cases about "complex conspira-

cies involving multiple transactions of different amounts of drugs imported at different times, with a shifting cast of actors"), cert. denied, 539 U.S. 928, 540 U.S. 831, and 540 U.S. 845 (2003). That evidence overwhelmingly showed that petitioner either knew or could reasonably have foreseen that the conspiracy of which he was a member involved five or more kilograms of cocaine.

As Valentin testified, he typically sold petitioner four-and-a-half ounces of cocaine once or twice a week for several years. Pet. App. 3. Even a single sale of four ounces per week would have been sufficient, after just 45 weeks, to reach the five-kilogram threshold that is necessary to trigger an enhanced sentence under 21 U.S.C. 841(b)(1)(A)(ii).[7]

At any rate, the evidence also showed that petitioner's involvement in the conspiracy went far beyond his own purchases from Valentin. In addition to those weekly transactions, petitioner accompanied Valentin on a trip to pick up "a couple kilos," Pet. App. 3, and the recorded conversations show that he was aware of other such trips, C.A. App. 266-267, 271, 280-282, 308-309, 311-312. Petitioner introduced Valentin to another person who ended up purchasing cocaine in kilogram quantities, see Pet. App. 3 n.1, agreed to help Valentin collect money from other buyers, *id.* at 4; C.A. App. 261-262, 265-267, 277-278, 293-296, and conferred with Valentin about how Valentin could retrieve $30,000 in drug proceeds from an impounded car, Pet. App. 4; C.A. App. 267-271. Under those circumstances, any possible error in failing to ask the jury to decide whether it was fore-

[7] One ounce is equivalent to 28.35 grams. See Guidelines § 2D1.1, comment. 10 (measurement conversion table). Accordingly, four ounces is equivalent to 113.4 grams, and 45 sales of 113.4 grams would produce a combined weight of 5.103 kilograms.

seeable to petitioner that the conspiracy of which he was a part involved five or more kilograms of cocaine was harmless beyond a reasonable doubt. See *Neder* v. *United States*, 527 U.S. 1, 10-11 (1999).[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
DEMETRA LAMBROS
Attorney

JULY 2009

---

[8] To the extent that the jury's question is relevant to the harmless-error inquiry (see Pet. 6, 16), it favors the government, not petitioner. The phrasing of the question—"Does [petitioner] *simply* have to have knowledge of the selling of 5 kilos or does he have direct involvement with selling 5 kilos" (emphasis added)—appears to presuppose that petitioner had the relevant knowledge.

(3)

No. 08-1374

Supreme Court, U.S.
FILED
AUG 17 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CHRIS ROBINSON,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF OF THE PETITIONER

PAUL D. CROSS
Attorney at Law
1020 West Main Street
Post Office Box 99
Monteagle, TN 37356
(931) 924-2060

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER DEFENDANT-SPECIFIC DRUG QUANTITY FINDINGS MUST BE MADE FOR PURPOSES OF TRIGGERING THE ENHANCED PENALTY PROVISIONS OF 21 USC SECTIONS 841(b)(1)(A) AND (b)(1)(B) 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Blumenthal vs. U.S., 332 U.S. 539 (1947) 6
Burns vs. United States, 501 U.S. 129 (1991).....7
Edwards vs. United States, 523 U.S. 511 (1998).....5
U.S. vs. Banuelos, 322 F. 3d 700 (9th Cir. 2003) 2
U.S. vs. Collins, 415 F. 3d 304 (4th Cir. 2005).....2
U.S. vs. Cotton, 535 U.S. 625 (2002).....4
U.S. vs. Darwich, 337 F. 3d 645 (6th Cir. 2003) 6
U.S. vs. Lanni, 970 F. 2d 1092 (2nd Cir. 1992).....7
U.S. vs. Okayfor, 996 F. 2d 116 (6th Cir. 1993) 7
U.S. vs. Pruitt, 156 F. 3d 638 (6th Cir. 1998) 3
U.S. vs. Tomasino, 206 F. 3d 739 (7th Cir. 2000) 7

STATUTES

18 USC Section 3553(a)(2) 7
21 USC Section 841(b).....1, 6
21 USC Section 841(b)(1)(A) 1, 2, 6
21 USC Section 841(b)(1)(B) 1, 6
21 USC Section 846 3
28 USC Section 991(b)(1) 7

TABLE OF AUTHORITIES – Continued

Page

U.S. SENTENCING GUIDELINES

USSG 1A4(a) 8

USSG 1B1.3(a)(1)(B) 7, 8

USSG 3B1.2 8

REPLY BRIEF OF PETITIONER CHRIS ROBINSON

ARGUMENT

THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER DEFENDANT-SPECIFIC DRUG QUANTITY FINDINGS MUST BE MADE FOR THE PURPOSES OF TRIGGERING THE ENHANCED PENALTY PROVISIONS OF 21 USC SECTIONS 841(b)(1)(A) AND (b)(1)(B).

The government's brief in opposition to the petition for certiorari acknowledges (p. 13) the circuit split on the single issue raised, which is whether, for purposes of applying the enhanced penalties of 21 USC Section 841(b), triggered by drug quantity thresholds, those thresholds may be determined on a conspiracy-wide basis or must be defendant-specific.

A substantial portion of the government's brief is devoted to a recitation of a government-friendly version of the facts of the case, many or most of which (e.g. Petitioner's assistance in warning of police investigation, p. 3 of government's brief) arguably support an inference of conspiracy, but have no relevance to this issue. Some of those facts were recited by the Sixth Circuit's opinion; some were not. The Sixth Circuit had before it several issues which are no longer relevant, notably, the sufficiency of evidence to support the conspiracy conviction.

The government has set forth as fact virtually everything Juan Valentin, its primary witness,

testified to, notwithstanding that he himself pled guilty to the drug conspiracy and that his testimony was critical if he himself were to avoid a life sentence. Presumably, this was done to cast Chris Robinson in an undeserving light. However, there is every reason to believe – in fact, the proposition is virtually compelled – that the jury in this case was skeptical of his testimony. The government's brief (p. 17) suggests that the requisite five-kilogram cocaine quantity necessary for the life-sentence-mandating provisions of 21 USC Section 841(b)(1)(A) could be reached through a process of extrapolating the per-week quantity Valentin claimed he sold Chris Robinson for a period of 45 weeks. This means of establishing the five-kilogram mark was suggested by AUSA Piper in his closing argument. It was, however, virtually certain to have been rejected by the jury; otherwise, the jury would have had no occasion to be asking for guidance as to whether the Petitioner would have to know about or be personally involved with a particular quantity for it to count against the statutory threshold for an enhanced sentence.

Another major portion of the government's brief is directed to the support of the proposition that the circuit-level authority (*U.S. vs. Collins*, 415 F. 3d 304, 313-314 (4th Cir. 2005) and *U.S. vs. Banuelos*, 322 F. 3d 700, 704-705 (9th Cir. 2003), both cited in Robinson's original petition in opposition to its position), is simply wrong. Its most basic argument is that this authority violates the plain language of the statute and Congressional intent. Authority is cited

(government's brief, pp. 8-9) for the proposition that since several courts have held that a defendant assumes the risk of the quantity he is in possession of in the substantive, non-conspiracy context, the same rule should apply where conspiracy is charged; i.e., that an individual defendant should assume the risk of quantities others were handling, even where the defendant had no knowledge of those quantities, they were not foreseeable to him, and they did not advance the cause of the conspiracy. The fundamental unfairness is much higher where his risk consists of what others are doing, unknown and unforeseeable to a defendant.

The matter of attribution of drug quantity where the offense is substantive and non-inchoate is relatively straightforward, logically rendering a Congressional statement or clarification unnecessary. As the government points out, however, a drug conspiracy is an inchoate offense which does not require any overt act for the crime to be complete (government's brief, p. 12). The government further points out that 21 USC Section 846 specifies that the punishment for conspiracy is the same as for the crime which is the object of the conspiracy. That being the case, numerous questions present themselves, which Congress has addressed either not at all or only indirectly. Courts have held, though Congress has not spoken, that the particular quantity necessary to trigger the enhanced penalties need not be agreed or even under contemplation (e.g. *U.S. vs. Pruitt*, 156 F. 3d 638 (6th Cir. 1998)), contrary to

what would seem to be the most logical rule, given the definition of conspiracy. An agreement is sufficient under this authority so long as the substantive acts of the conspiracy ultimately reach the required total. An obvious corollary is that a particular defendant need not have been a party to a quantity-specific agreement. His knowledge could suggest only a small quantity; the government's position would expose him to punishment corresponding to unlimited quantities.

The government's brief cites the case of *U.S. vs. Cotton*, 535 U.S. 625 (2002) for the proposition that this Court has implicitly approved its position on the issue in this case. This is incorrect. The issue in *Cotton* was whether the failure to specify drug quantity in the indictment, unobjected to at the trial level, deprived the trial court of jurisdiction or justified plain-error relief. What was *not* at issue was the question of whether quantity determinations were to be conspiracy-wide or defendant-specific; indeed, in the pre-*Apprendi* setting of Cotton's trial, the district court made defendant-specific quantity determinations: "The District Court found, based on the trial testimony, respondent Hall responsible for at least 500 grams of cocaine base, and the other respondents responsible for at least 1.5 kilograms of cocaine base", *Cotton* at 628. The opinion contains no indication of criticism of this practice or that it was unnecessary; nor did the government argue that the trial court had erred in failing to hold Mr. Hall

accountable for the higher quantities attributed to his co-conspirators.

Petitioner stands by his original (Petition for Certiorari, pp. 9, 10), quotations from the case of *Edwards vs. United States*, 523 U.S. 511 (1998), which held that, under the facts of that case, relevant-conduct provisions of the U.S. Sentencing Guidelines mooted the question of whether the sentencing court was required to resolve the ambiguity in the jury's verdict (cocaine base vs. powder cocaine) in the defendant's favor; specifically noting, however, that had the question been whether a sentence exceeding the default statutory maximum for a cocaine-only conspiracy was supportable, it " . . . would [have made] a difference . . . ", *Edwards* at 515. This is identical in principle to the Robinson facts, the only difference being that here, quantity rather than drug type triggered the higher statutory sentence.

The government has asserted that the Respondent has waived the quantity-determination issue at numerous junctures and that therefore, any review by this Court must test its merits under plain-error standards. Specifically, the issue is said to have been waived because it was not asserted in opposition to the original jury instructions nor the jury verdict form, nor at sentencing. It is true that Petitioner's counsel did not raise an objection to the original jury charge nor verdict form, but he did object when the jury posed its question, when the matter was still firmly in the control of the trial court, which was

persuaded by the unsupported statement from the Assistant U.S. Attorneys prosecuting the case that a forseeability limitation was unnecessary (Petition for Certiorari, App. pp. 42-43). No authority is cited to suggest that this would be insufficient for preserving the matter at the trial stage. Similarly, this issue has nothing to do with and is accordingly not properly raised at a sentencing hearing; it is a trial issue. The drug quantity determination for purposes of the enhanced-penalty provisions of 21 USC 841(b)(1)(A) and (b)(1)(B) must be found as an element of the offense. Each of the subsections of 21 USC Section 841(b) constitutes a separate offense with separate elements which all must be proved beyond a reasonable doubt when a defendant guilty of a conspiracy is sentenced in excess of the default statutory maximum, *U.S. vs. Darwich*, 337 F. 3d 645, 655 (6th Cir. 2003).

The Sixth Circuit did not suggest that this issue was waived or that it was limited to plain error review (though an issue which is not on appeal at this point was so treated, and that court could not determine whether a second one was).

The government's position on the merits of the issue in this case raises the prospect of massive sentencing disparity. The law is well settled (*Blumenthal vs. U.S.*, 332 U.S. 539, 556-557 (1947)) that a defendant need not know all of his co-conspirators nor the full scope of the conspiracy. Per the government's position, the lowliest lackey in the drug operation, completely unaware of the scope of the operation, is

held to the same penalties, under an assumption-of-risk standard, as the kingpin who walks away with virtually all of the profit and other perks the operation has enabled. Unwarranted sentencing disparity has been soundly condemned, and Congress's promulgation of the sentencing guidelines had as a focal point, not to say *the* focal point, its elimination, this being the second-listed (after reference to 18 USC Section 3553(a)(2)) objective assigned to the U.S. Sentencing Commission by 28 USC Section 991(b)(1). The purpose of the guidelines is to eliminate the "unwarranted disparit[ies] and . . . uncertainty" associated with indeterminate sentencing, *Burns vs. United States*, 501 U.S. 129, 133 (1991). As pointed out in the original Petition for Certiorari in this cause (pp. 12-13), those guidelines (USSG 1B1.3(a)(1)(B) in particular) impose a forseeability limitation on relevant conduct which drives the offense level for sentencing purposes. " . . . [A] defendant is chargeable for the drug transactions of other members of the conspiracy only if they were known to him or were reasonably foreseeable to him." *U.S. vs. Okayfor*, 996 F. 2d 116, 120 (6th Cir. 1993). " . . . [A] sentencing judge may not, without further findings, simply sentence a defendant according to the amount of narcotics involved in the conspiracy." *Id.* at 120-121, quoting *U.S. vs. Lanni*, 970 F. 2d 1092, 1093 (2d Cir. 1992).

A presumption of regularity attaches to the U.S. Sentencing Commission's compliance with its congressional mandate, *U.S. vs. Tomasino*, 206 F. 3d

739, 742 (7th Cir. 2000), *rehearing granted* 230 F. 3d 1034. Accordingly, USSG 1B1.3(a)(1)(B) may be said to enjoy this presumption *vis-à-vis* the Commission's mandate, especially given its centrality in the implementation of the "real offense" component of federal sentencing as described in USSG 1A4(a).

This result is applicable as well to the sentencing guideline (USSG 3B1.2) reducing a defendant's sentencing exposure for his minor role in the offense.

In sum, it is the government's position, not that of the Petitioner, which cannot be reconciled with what may be inferred as Congressional intent.

Knowledge or at least forseeability is necessary to avoid unwarranted disparity in sentences.

CONCLUSION

The Court should grant the writ of certiorari and reverse the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

PAUL D. CROSS
CLEMENTS AND CROSS
Attorney for Petitioner
Post Office Box 99
Monteagle, TN 37356
(931) 924-2060